United States Court of Appeals

for the Second Circuit

APPENDIX

74-2153

United States Court of Appeals

FOR THE SECOND CIRCUIT

KAMA RIPPA MUSIC, INC.,
Plaintiff-Appellant,

—against—

MS. MELANIE SCHEKERYK,
Defendant-Appellee,

—and—

MS. MELANIE SCHEKERYK and
PETER SCHEKERYK, individually
and d/b/a AMELANIE MUSIC,
Defendants.

MELANIE SCHEKERYK,
Counterclaimant-Appellee,

—and—

MS. MELANIE SCHEKERYK and
PETER SCHEKERYK, individually and d/b/a
AMELANIE MUSIC and TWO PEOPLE MUSIC,
Counterclaimants,

—against—

KAMA RIPPA MUSIC, INC.,
Counterdefendant-Appellant,

—and—

KAMA SUTRA MUSIC, INC. and
BUDDAH RECORDS, INC.,
Counterdefendants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(73 Civ. 3789)

JOINT APPENDIX

EMIL KOBRIN KLEIN & GARBUS
Attorneys for
Plaintiff-Counterdefendant-Appellant
540 Madison Avenue
New York, N. Y.

SANDOR FRANKEL
Attorney for
Defendants-Counterclaimants-Appellees
225 Broadway
New York, N. Y.

PAGINATION AS IN ORIGINAL COPY

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A-1A

CIVIL DOCKET
UNITED STATES DISTRICT COURT

73 CIV. 3789

Jury demand date: 12-19-73
by Amelanie & Two People Music

JUDGE KNAPP

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
KAMA RIPPA MUSIC, INC. -v- MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC, DEFTS. VS. MELANIE and PETER SCHEKERYK, ind. and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC, INC., COUNTERCLAIMANTS VS. KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC. and BUDDAH RECORDS, INC.	For plaintiff: Emil, Kobrin, Klein & Ga 540 MadisonAve, NYC 100 688-6040 (For pltff's & counterd For defendant: Sandor Frankel (Deft's/counter-c 225 Broadway, N.Y. 10007-227-60 ~~Emil Kobrin, Klein & Carbus~~ ~~540 Madison Ave. N.Y., 10022-688-~~ ~~(deft's Buddah & Kama Sutra)~~

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	
J.S. 5 mailed x	Clerk		8/31/73	Emil K.	15 -	
			9/4/73	L. St.		15 -
J.S. 6 mailed 20-Dec-73	Marshal		3/4/74	Emil	5 -	
			3/13/74	Treas		5 -
Basis of Action: Breach of contract.	Docket fee		4/22/74	Emil	5 -	
			5/23/74	Treas		5 -
	Witness fees					
Action arose at:	Depositions					

B-1A

KAMA RIPPA MUSIC,INC. -v- MS. MELANIE SCHEKERYK, et ano.

73 CIV. 3789

JUDGE KNAPP

DATE	PROCEEDINGS	Date Order Judgment M
ug31-73	Filed complaint and issued summons.	
ep.28-73	Filed summons with marshals return: Served; Melanie Schekeryk by S.Frankel on 9-20-73. Peter Schekeryk " " " " 9-20-73.	
et. 15-73	Filed pltff's notice of dismissal pursuant to rule 41(a)1. , So ordered. Knapp,J.	SF.
ct.11-73	Filed deft's ANSWER & counterclaims.	
ct.11-73	Filed deft's/counterclaimants notice to tke deposition of pltff.	
ct.24-73	Filed deft's affidavit & notice of motion to restore action to trial,	
ov.20-73	Filed Order that deft's motion to vacate the order of dismissal is, granted & the substituted motion by pltff. for a discretionary, order dismissing the complaint is denied. So ordered. Knapp,J.	
ov.20-73	Filed stip & order that depositions noticed by deft's counterclaimants, are adj. to 11-27-73. So ordered. Knapp,J. (Filed 10-29-73)	
ov.20-73	Filed Supplemental summons with marshals return: Served: Kama Sutra Music Inc. by Sandor Frankel on 10-18-73.	
ov.20-73	Filed Supplemental summons with marshals return: Served: Buddah Records' by Sandor Frankel on 10-18-73. (Both above summons filed on 11-7-73)	
ov.28-73	Filed pltff's reply to counterclaims.	
ov.28-73	Filed ANSWER to 3rd.pty.complaint by 3rd.pty.deft. Kama Sutra Mustic.	EKK&G
ov.28-73	Filed ANSWER to 3rd.pty.complaint by 3rd.pty.deft. Buddah Records,	EKK&G
ec.11-73	Filed pltff's & 3rd.pty.deft's affidavit & notice of motion Re: , to dismiss the 3rd.pty.complaint ret.12-21-73.	
ec.20-73	Filed pltff's & 3rd.pty.deft's affidavit & notice of motion to strike, jury demand ret.1-4-74.	
ec.19-73	Filed deft's(Amelanie Music & Two People Music) demand for jury trial.	
an.4-74	Filed deft's notice to take deposition of Kama Rippa Music, Inc.	
Jan.9-74	Filed stip & order that all depositions before trial are adjourned, until a decision is rendered on pending motion of Kama Rippa , Music for dismissal of claims against them. Knapp,J.	
Jan 17-74	Filed interrogs to defts and 3rd pty pltffs' counterclaimants.	
eb.14-74	Filed stip & order that defts/counterclaimants request to produce, is adj. until 15 days after decisions are rendered on pending, motions to dismiss & summary judgment. KNAPP,J.	
Jun.19-74	Filed OPINION #70853: Various motions are now before the court. I, shall deal only with Melanie's motion for summary judgment on her, second & third counterclaims against Kama. Summary judgment will, be granted to Melanie on her second & third counterclaims against, Kama. Melanie moves for summary judgment on her fifth counterclaim, against Kama Rippa. Motion denied. Her sixth counterclaim to demand, damages, the motion to dismiss is granted. Decision is reserved on the motion to strike Melanie's demand for jury trial. Settle order on five days notice. m/n	
1.18/74	Filed JUDGMENT- that the cross-motion of Melanie Schekeryk for summary judgment on the second counterclaim asserted by Melanie Schekeryk against Kama Rippa Music,Inc. is granted; that the cross-motion of Melanie Schekeryk for summary judgment on the third counterclaim asserted by Melanie Schekeryk against Kama Rippa Music,Inc, is granted,etc. Knapp,J. JUDGMENT ENTERED 7/22/74 Clerk	
l 11-74	Filed ORDER.Motion by pltff seeking relief,setting aside order granting summary	

(cont'd pg 2)

C-1A

73 Civ.3789 KAMA RIPPA MUSIC,INC. VS. MS MELANIE SCHEKERYK ET AL JUDGE KNAPP

DATE	PROCEEDINGS
Jul 31-74	(contd)judgment;modifying order,staying its execution.All such relief is denied. The motion is in all respects denied.So ordered.Knapp,J.(mn)
7/29/74	Filed pltff/counterdefendant ' notice of appeal from judgment of 7/22/74. mailed copies.
Jul.26-74	Filed True copy of notice of entry of Order & judgment filed. 7-18-74.
Aug.22-74	Filed PltFf's Notice of Appeal from Order dated 7/30/74 which, inter alia denied reargument of Courts Order and Judgment of 7/22/74 granting deft-counterclaimant Ms.Melanie Schekeryk's cross - motion for summary judgment on 2nd&3rd counterclaims as pltff counterdeft Kama Rippa Music Inc.(Mailed notices to Sandor Frankel .Esq.on 8/23/74)
Sep.9-74	Filed deft's/Counter-claimants affidavit & notice of motion to hol Kama Rippa Music in contempt ret.before Knapp,J.
Oct.2-74	Filed notice that record on appeal has been certified & transmitte to the U.S.C.A. on this 2nd. day of Oct. 1974.
Oct.2-74	Filed affidavit of J.Marsicano in opposition to motion by deft., Counterclaiman Re: Contempt.
Oct.3-74	Filed affidavit of Fred J. Halsey,Jr. in opposition to motion by deft/counterclaimant Re; Contempt.
Oct.18-74	Filed pltff's /Counterdeft's affidavit & notice of motion for orde resettling court's judgment entered 7-18-74. ret.before Knapp,J.
Oct.22-74	Filed affidavit of Sandor Frankel in opposition to motion by pltf
Oct.21-74	Filed stip & order on motion by Melanie Schekeryk for an order holding Kama Rippa Music, Inc. in contempt, as indicated.Knapp,
Oct.24-74	Filed MEMORANDUM DECISION #41360: Pltff. Kama Rippa moves to resettle the "Order & judgment of this court, filed July 18,197 Kama Rippa's motion is accordingly denied. So ordered. Knapp,J.

199--Summons, Supreme Court, without Notice

1A
c

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE — BROADWAY, NEW YORK

Supreme Court of the State of New York
County of NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff

against

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendant s

Plaintiff designates
New York *County*
as the place of trial.

Summons

Plaintiff resides in
New York *County.*

To the above named Defendant s:

You are hereby Summoned *to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.*

Dated, September 17, *19* 73
New York, New York

EMIL, KOBRIN, KLEIN & GARBUS

Attorney for Plaintiff
Office and Post Office Address
540 Madison Avenue
New York, New York 10022
(212) 688-6040

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- X

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

---------- X

Index #

VERIFIED COMPLAINT

KAMA RIPPA MUSIC, INC., by its attorneys, Emil, Kobrin, Klein & Garbus, complaining of defendants herei. alleges:

AS AND FOR A FIRST CAUSE OF ACTION

FIRST: Plaintiff, KAMA RIPPA MUSIC, INC. (hereinafter "KR Music"), is a corporation organized and existing under the laws of the State of New York, having offices at 810 Seventh Avenue, New York, New York,and is principally engaged in the business of music publishing.

SECOND: On information and belief, defendants are residents of the State of New Jersey and do business therein as entertainer, producer, artist manager and song writer. All defendants do continuing business in the State of New York.

THIRD: Defendant AMELANIE MUSIC is, on information and belief, the assumed name under which defendants MELANIE SCHEKERYK and PETER SCHEKERYK jointly conduct their music publishing business.

FOURTH: On information and belief, Defendant AMELANIE MUSIC owns, controls, administers and otherwise does business in the musical compositions written by defendant MELANIE SCHEKERYK.

FIFTH: On or about May 31, 1968, plaintiff and defendants entered into a Co-Publishing Agreement, whereby defendants and plaintiff agreed to co-publish certain compositions written by defendant MELANIE SCHEKERYK.

SIXTH: On or about May 31, 1968, plaintiff and defendants entered into an Exclusive Songwriters Agreement whereby defendant MELANIE SCHEKERYK agreed to furnish exclusive songwriter's services to plaintiff KR MUSIC and defendant AMELANIE MUSIC, jointly.

SEVENTH: On or about August 24, 1971, in complete settlement of the obligations of the aforesaid Co-Publishing Agreement and Exclusive Songwriters Agreement, both as amended, and further, as partial settlement of then ongoing litigation between the parties hereto, Plaintiff and Defendants agreed that certain compositions wholly written by Defendant MELANIE SCHEKERYK would be delivered to Plaintiff for publishing and that, within two (2) years of August 24, 1971, Defendant MELANIE SCHEKERYK would record and release three (3) of those compositions delivered pursuant to said Settlement Agreement. A copy of said Settlement Agreement is annexed hereto as Exhibit "1."

EIGHTH: On or about the 27th day of June, 1973, Peter M. Thall, Esq. of Robert L. Casper, P.C., attorney for Defendants, advised Plaintiff KR MUSIC that, of those compositions then delivered to plaintiff KR MUSIC for publishing pursuant to the

aforesaid settlement agreement, Defendant MELANIE SCHEKERYK had recorded three compositions,namely: "I Almost Forgot," "Moonbeam" and "Let Him See Your Smile" in partial satisfaction of her obligations pursuant to said Settlement Agreement.

NINTH: On or about the 12th day of July, 1973, in response to a prior inquiry of Plaintiff's counsel, said Peter M. Thall, Esq. advised Plaintiff's counsel that Defendants saw no obligation to release the aforesaid three (3) recorded compositions.

TENTH: As of the date of this Complaint, Defendants have not released for public sale and distribution any one of said three (3) recorded compositions and, on information and belief, are not to release any of such compositions prior to the expiration of the two year period provided for in said Settlement Agreement.

ELEVENTH: Paragraph "6" of said Settlement Agreement provides that if such three (3) recordings are not made and released then Defendants would pay to Plaintiff the sum of $25,000 per composition or a total of $75,000 as liquidated damages.

TWELFTH: Plaintiff is entitled to liquidated damages of $75,000 by reason of the failure of Defendants to record and release the aforesaid three (3) compositions.

AS AND FOR A SECOND CAUSE OF ACTION

THIRTEENTH: Plaintiff repeats and realleges each and every allegation contained in Paragraphs "FIRST" through "ELEVENTH" of this Complaint as if fully recited herein.

FOURTEENTH: By reason of their refusal to record and release said three (3) compositions Defendants have breached and violated their Settlement Agreement with Plaintiff of August 24, 1971.

FIFTEENTH: By reason of the foregoing facts Plaintiff has been damaged in the amount of $500,000.

AS AND FOR A THIRD CAUSE OF ACTION

SIXTEENTH: Plaintiff repeats and realleges each and every allegation contained in Paragraphs "FIRST" through "ELEVENTH" of this Complaint as if fully recited herein.

SEVENTEENTH: At the time of entering into said Settlement Agreement Defendants were fully aware that Plaintiff would not make any monies from said three (3) compositions unless Defendants caused their release and sale, and, in fact, Plaintiff contemplated the release of said three (3) compositions in computing the value of said settlement.

EIGHTEENTH: Plaintiff relied on the understanding that said three (3) compositions would be released by Defendants and in reliance on such understanding entered into said Settlement Agreement of August 24, 1971.

NINETEENTH: Upon information and belief, in fact and to the knowledge of Defendants, Defendants at the time of entering into said Settlement Agreement did not intend to record and release any of the compositions delivered to Plaintiff pursuant to said Settlement Agreement.

TWENTIETH: By reason of the foregoing, Plaintiff has been damaged by the acts of Defendants in the amount of $500,000.

AS AND FOR A FOURTH CAUSE OF ACTION

TWENTY-FIRST: Plaintiff repeats and realleges each and every allegation contained in Paragraphs "FIRST" through "ELEVENTH" of this Complaint as if fully recited herein.

TWENTY-SECOND: By reason of the dispute and adverse contentions as aforesaid, a judicial determination of the dispute is desirable and necessary for the Plaintiff and the Defendants.

TWENTY-THIRD: Plaintiff has no adequate remedy at law.

WHEREFORE Plaintiff prays for the following relief:

1. Judgment on the First Cause of Action against the Defendants, jointly and individually, in the amount of $75,000, together with costs and disbursements of this action.

2. Judgment on the Second Cause of Action against the Defendants, jointly and individually, in the amount of $500,000, together with the costs and disbursements of this action.

3. Judgment on the Third Cause of Action against the Defendants, jointly and individually, in the amount of $500,000, together with the costs and disbursements of this action .

4. Declaratory judgment on the Fourth Cause of Action, pursuant to the Civil Practice Law and Rules, declaring the rights and other legal relations of the parties in respect to the matters set forth in the Complaint, and that said Declaratory Judgment specify the following:

A. Whether the Defendants have satisfied the Settlement Agreement of August 24, 1971 by merely recording said three (3) compositions and subsequently refusing to release them for sale; and

B. That the Plaintiff have such other different and further relief and declaration of the rights and legal relations of the parties to this action as to the Court may seem proper and necessary.

Dated: New York, New York
September 17, 1973

Yours, etc.,

EMIL, KOBRIN, KLEIN & GARBUS
Attorneys for Plaintiff
Office and P. O. Address
540 Madison Avenue
New York, New York 10022
(212) 688-6040

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ARTHUR KASS, being duly sworn, deposes and says that deponent is the President of KAMA RIPPA MUSIC, INC., plaintiff, the corporation named in the within action; that deponent has read the foregoing Complaint and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because plaintiff is a domestic corporation. Deponent is an officer thereof, to wit, its President. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: materials contained in file.

ARTHUR KASS

Sworn to before me this
17th day of September, 1973

HARLEY I. LEWIN
Notary Public, State of New York
No. 31-7531463
Qualified in New York County
Commission Expires March 30, 1974

Exhibit I 8A

The Kama Sutra Group BUDDAH RECORDS, INC. / KAMA-SUTRA RECORDS, INC.
BUDDAH MUSIC, INC. / TENDER-TUNES MUSIC CO., INC. / KAMA-SUTRA MUSIC CO., INC. / KAMA-RIPPA MUSIC, INC.
1650 BROADWAY, NEW YORK, NEW YORK, 10019 / PHONE (212) 582-6900

August 24, 1971

Ms. Melanie Schekeryk,
Mr. Peter Schekeryk, and
Amelanie Music
c/o Robert Casper, Esq.
1780 Broadway
New York, New York 10019

Dear Melanie and Peter:

Reference is hereby made to our Co-Publishing Agreement of May 31, 1968 and our Exclusive Songwriters Agreement of May 31, 1968:

In connection therewith, we hereby agree that the delivery of a total of twenty (20) musical compositions wholly written by Melanie Schekeryk to us under and pursuant to a Songwriters and Co-Publishing Agreement aforesaid, and as an addition to musical compositions previously delivered by Melanie Schekeryk to Kama Rippa Music, Inc., shall satisfy the delivery requirements with respect to compositions written by Melanie Schekeryk.

We hereby accept the said twenty (20) compositions in full and complete satisfaction of Melanie Schekeryk's remaining obligations under the Songwriters Agreement and the Co-Publishing Agreement and any and all extensions of said Agreements.

You agree to deliver to us lead sheets and lyrics for the aforesaid compositions and cooperate with us in connection with our taking necessary steps to copyright and protect same.

Melanie Schekeryk hereby agrees to record, within two (2) years from the date of this Agreement, not less than three (3) of the said twenty (20) musical compositions to be delivered hereunder.

The Kama Sutra Group BUDDAH RECORDS, INC / KAMA-SUTRA RECORDS, INC.
BUDDAH MUSIC, INC. / TENDER-TUNES MUSIC CO., INC. / KAMA-SUTRA MUSIC CO., INC. / KAMA-RIPPA MUSIC, INC.
1650 BROADWAY, NEW YORK, NEW YORK, 10019 / PHONE (212) 582-6900

If in the event Melanie Schekeryk does not record three (3) of the said twenty (20) musical compositions, pursuant to the paragraph aforesaid, then for each recording she fails to make, Melanie Schekeryk agrees to pay Twenty-Five Thousand ($25,000) Dollars to Kama Rippa Music, Inc., or its designee or assignee, or a total of Seventy-Five Thousand ($75,000) Dollars if she records none of the twenty (20) musical compositions in accordance with the paragraph aforesaid, as liquidated damages. Kama Rippa Music, Inc. agrees to accept such liquidated damages as full compensation and the sole remedy for any failure by Melanie Schekeryk to record musical compositions in accordance with the provisions of this Agreement.

With respect to each of the aforesaid musical compositions, Melanie Schekeryk and Amelanie Music shall retain all rights granted to each of them pursuant to the Songwriters Agreement and the Co-Publishing Agreement aforesaid, including, without limitation, any causes of action or counterclaims that they may have arising out of same.

Kama Rippa Music, Inc. agrees to issue whatever mechanical licenses are required for mechanical reproduction by record companies of the aforesaid twenty (20) musical compositions.

You and we expressly agree and understand that no press release or public statement, with respect to any matter contained in this Letter Agreement, shall be made by any party hereto except as may be mutually agreed to in writing by you and us.

This Agreement and all rights and obligations of the parties hereunder shall be construed and enforced under the laws of the State of New York, United States of America, where this Agreement has been or is being deemed made.

The Kama Sutra Group BUDDAH RECORDS, INC. / KAMA-SUTRA RECORDS, INC.
BUDDAH MUSIC, INC / TENDER-TUNES MUSIC CO., INC / KAMA-SUTRA MUSIC CO., INC / KAMA-RIPPA MUSIC, INC.
650 BROADWAY, NEW YORK, NEW YORK, 10019 / PHONE (212) 582-6900

This Agreement cannot be modified, changed or discharged except by writing duly executed by the parties hereto with the same formality as this Agreement. No waiver by any party hereto, whether express or implied, of any provisions of this Agreement or of any breach or default of any party, shall constitute a continuing waiver of such provisions or of a waiver of any other provision or provisions of this Agreement and no such waiver by any party shall prevent such party from enforcing any and all provisions of this Agreement, or from acting upon any subsequent breach of default of any other party, under any provisions of this Agreement.

If the foregoing reflects your understanding, as it does ours, kindly signify your acceptance by signing beneath the words, "Accepted and Agreed To".

Very truly yours,

KAMA RIPPA MUSIC, INC.

By Arthur Kass
ARTHUR KASS

ACCEPTED & AGREED TO:

AMELANIE MUSIC

By Melanie Schekeryk
Peter Schekeryk

By Melanie Schekeryk
MELANIE SCHEKERYK

By Peter Schekeryk
PETER SCHEKERYK

S-30N-5M-503040(67) 346

SHERIFF'S LEVY BY SERVICE OF ORDER OF ATTACHMENT ON GARNISHEE

11A

LEVY: I HEREBY LEVY UPON AND ATTACH, to the extent necessary to satisfy the plaintiff's demand with interest, costs, and sheriff's fees and expenses, any interest of the defendant named in the copy of Order of Attachment served upon you herewith in personal property in your possession or custody and upon any debt you owe to the defendant, not specifically exempt from levy by law. This includes but it not limited to money, notes, bonds, checks and any other instruments for the payment of money, stocks and securities, a partnership interest, an interest in a decedent's estate or in any property or fund held or controlled by a fiduciary, any right or share in the stock of an association or corporation for which a certificate of stock is not outstanding, together with interest, dividends or profits accruing thereon and therefrom, and ten per cent of the gross salary or compensation payable by you periodically to the defendant.

EFFECT OF LEVY: This levy affects any existing debt, which is past due, currently due or yet to become due, certainly or upon demand of the defendant, wherever incurred, including any cause of action which the defendant can assign or transfer wherever accruing, and any existing personal property which the defendant can assign or transfer, whether it consists of a present or future right or interest and whether or not it is vested, including any debt or property specified in a notice accompanying the Order of Attachment; and, it also affects all property of the defendant hereafter coming into your possession or custody and all debts hereafter coming due from you to the defendant, until you pay, transfer or deliver the debt or property to the Sheriff. **YOU ARE FORBIDDEN BY LAW,** for ninety days after this service and for such additional time as the Court by order may provide, to transfer, pay over, or otherwise dispose of the debt or property so levied upon as hereinbefore specified to any person other than the Sheriff, except by written direction of the Sheriff. The Sheriff has and claims a lien upon the levied property for his statutory fees and poundage.

DEMAND: 1. I HEREBY DEMAND that you furnish me forthwith with a **STATEMENT, IN DUPLICATE,** specifying the amount and nature of any and all such property of the defendant, including the maturity dates of debts. If you do not, you are subject to examination under oath by direction of the Court.

2. I HEREBY FURTHER DEMAND that you forthwith transfer or deliver all such property and pay over to me all such debts upon maturity, and execute any document necessary to effect the payment, transfer or delivery. If you do not, you are subject to suit by the plaintiff to recover such property or the amount of your indebtedness, obligation or other accountability with costs and expenses.

DISCHARGE: Such payment or transfer or delivery shall discharge you from your obligation to the defendant to the extent of the payment, transfer or delivery. Make checks payable to the Sheriff, City of New York, and indicate the name of the case when remitting.

Dated, the 19 day of Sept 19 73

Francis T. Carr
Deputy Sheriff

JOHN J. McCLOSKEY
Sheriff of the City of New York

Joseph L. Brennan
Under Sheriff, in Charge
New York County Division
31 Chambers Street
New York, N. Y. 10007

12A

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York, on the 18th day of September, 1973.

P R E S E N T :

HONORABLE WILFRED A. WALTEMADE

Justice.

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KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

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Index No. 16516/73

ORDER OF ATTACHMENT

A motion having been made by plaintiff, KAMA RIPPA MUSIC, INC., for an Order of Attachment against the property of Defendants MELANIE SCHEKERYK, PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC in an action in the Supreme Court, New York County.

NOW, on reading and filing the summons and complaint herein, the affidavit of Harley I. Lewin, Esq., duly sworn to the 17th day of September, 1973, and the exhibits annexed thereto, wherein it appears that a cause of action for a money judgment exists in favor of the Plaintiff and against the Defendants, for the sum stated in said affidavit, namely, $75,000 with interest from the 24th day of August, 1973, and that Plaintiff is entitled to recover said sum above all counterclaims known to it.

AND, it being further shown that Plaintiff is entitled to an Order of Attachment against the property of MELANIE SCHEKERYK, PETER SCHEKERYK and AMELANIE MUSIC, on the ground that said defendants are foreign residents whose only assets are monies due from KAMA RIPPA MUSIC, INC. and Peter Thall, Esq.,

NOW, on motion of Emil, Kobrin, Klein & Garbus, attorneys for plaintiff, it is

ORDERED, that Plaintiff's undertaking be and the same hereby is fixed in the sum of $15,000 of which the sum of $11,250.00 thereof is conditioned that Plaintiff will pay to said Defendants MELANIE SCHEKERYK, PETER SCHEKERYK and AMELANIE MUSIC all legal costs and damages which may be sustained by reason of the attachment if said Defendants recover judgment or it is finally decided that Plaintiff was not entitled to an attachment of Defendants' property, and the balance thereof conditioned that Plaintiff will pay to the Sheriff all of his allowable fees and it is further

ORDERED, that the Sheriff of the City of New York, or the Sheriff of any County of the State of New York, levy within his jurisdiction, at any time before final judgment, upon the monies now in the hands of KAMA RIPPA MUSIC, INC., 810 Seventh Avenue, New York, New York and the offices of Robert L. Casper, P.C., 1780 Broadway, New York, New York, in which said Defendants MELANIE and PETER SCHEKERYK and AMELANIE MUSIC, INC., have an interest and upon such debts owed to said Defendants as will satisfy Plaintiff's demand of $75,000.00 together with probable interest, costs and Sheriff's fees and expenses, and that he proceed herein in the manner required by law.

Enter within ten days

- 2 - /S/ W.A.W.
J.S.C.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

14A

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KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

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Index No.

AFFIDAVIT IN SUPPORT OF ORDER OF ATTACHMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HARLEY I. LEWIN, being duly sworn, deposes and says:

1. I am an associate of the firm Emil, Kobrin, Klein and Garbus, attorneys for plaintiff KAMA RIPPA MUSIC, INC. I submit this affidavit in support of an application, pursuant to Section 6201, et seq., of the Civil Practice Law and Rules, for an Attachment against MELANIE SCHEKERYK and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC.

2. The Attachment sought is in the amount of $75,000. This is the amount due and owing plaintiff as a result of defendants' refusal to release for sale certain of her compositions as recorded by her pursuant to prior agreement, described more fully below. In addition, these monies are claimed as damages by plaintiff in its First Cause of Action recited in a complaint dated and filed simultaneously herewith.

3. In further support of plaintiff's application, plaintiff submits herewith an undertaking for twenty (20%) percent of the aforesaid $75,000.

4. As the summons and complaint annexed hereto as Exhibit "A" indicate defendant MELANIE SCHEKERYK ("MELANIE") is a renowned singer/songwriter, resides in New Jersey and performs worldwide. Defendant PETER SCHEKERYK ("PETER") acts as MELANIE's business and personal manager and is the chief executive officer of the record company for whom MELANIE records. AMELANIE MUSIC is the fictitious name under which defendants MELANIE and PETER operate with respect to publishing and control of certain compositions written by MELANIE.

5. Plaintiff KAMA RIPPA MUSIC, INC. ("KAMA RIPPA") is the music publishing company formed, owned and controlled by the record company BUDDAH RECORDS, INC. Both are New York corporations.

6. Several years ago MELANIE was an exclusive recording artist for BUDDAH RECORDS, INC. ("BUDDAH"). As part of the ongoing relationship MELANIE and PETER agreed, as AMELANIE MUSIC, that KAMA RIPPA would act as co-publisher of a number of compositions written by MELANIE and recorded for BUDDAH.

7. Major disputes arose between the parties and a lawsuit was commenced by plaintiff herein under the caption BUDDAH RECORDS, INC., et al. -v- PARAMOUNT RECORDS, INC., AMELANIE MUSIC, et al., commenced February, 1971.

8. The above described lawsuit was eventually settled by all of the parties. As part of said settlement agreement was reached on August 24, 1971, between plaintiff KAMA RIPPA and defendants MELANIE, PETER and AMELANIE MUSIC whereby, in substance, defendants agreed to deliver twenty (20) compositions written by MELANIE to KAMA RIPPA, defendants agreed to record within two (2) years of said date at least three (3) of said twenty (20) compositions or to pay plaintiff twenty-five thousand ($25,000) dollars per song not recorded or a total of seventy-five thousand ($75,000) dollars if none of the said twenty (20)

compositions were so recorded. Reference is made to the Agreement of August 24, 1971, (the "Agreement") for a full description of its terms, a copy of which is annexed as Exhibit "1" to the Complaint (Exhibit "A" hereto).

9. Defendants did deliver to KAMA RIPPA the aforesaid twenty (20) compositions before August 24, 1973, the expiration date of the Agreement. However, defendants have not recorded and released for sale three (3) of said compositions as contemplated by the Agreement. Defendants, by their attorney Peter M. Thall, Esq., have taken the untenable position that the Agreement simply required them to record demonstration versions of the said three (3) compositions, not full versions for release and sale to the public.

10. On or about June 27, 1973, defendants' attorney notified plaintiff that demonstration versions of compositions written by MELANIE had been recorded. A copy of the letter of notification is annexed hereto as Exhibit "B".

11. On or about July 10, 1973, plaintiff, by Martin Garbus, Esq., notified Mr. Thall that plaintiff was insisting that defendants live up to the Agreement and release said three (3) compositions. A copy of the letter of notification is annexed hereto as Exhibit "C".

12. On or about July 12, 1973, defendants, by letter of Peter Thall, Esq., made clear that they did not intend to release said three (3) compositions. A copy of said letter is annexed hereto as Exhibit "D".

13. Defendants' position is simply ludicrous. The primary manner in which plaintiff would recoup its monies lost in releasing defendants from their obligations to plaintiff pursuant to their prior agreements with KAMA RIPPA and BUDDAH, would be through statutory mechanical royalties paid plaintiff when the aforesaid three (3) compositions were mechanically reproduced

as either phonograph records or pre-recorded tapes. To have such compositions released by artists other than MELANIE simply was not the understanding between the parties. If such were the case there would be no need for treating three (3) of the compositions any differently than the remaining seventeen (17). In addition, the penalty clause, fixed at twenty-five thousand ($25,000) dollars, would simply not make sense if it were not contemplated that this was the value of the mechanical royalties of the three (3) compositions as released and sold by defendants. Plaintiff intends at trial to produce prior writings clarifying the understanding between the parties as well as testimony from those directly involved in the negotiations leading to the Agreement now in dispute.

14. The term of the Agreement has now run, ending on August 24, 1973, and defendants have refused to release for sale said three (3) compositions. Defendants have, in addition, refused to pay over the $75,000 now due plaintiff pursuant to the penalty clause of the Agreement.

15. Plaintiff now holds approximately $80,000 of publishing royalties due defendants pursuant to the prior agreements between the parties. Plaintiff is required to pay this money over to defendants' attorneys at the offices of Robert L. Casper, P.C. before September 23, 1973, and will do so.

16. Plaintiff is informed and believes that the monies to be paid over to Mr. Thall are the only assets of defendants now remaining in the State of New York. Defendants live outside New York and are constantly "on tour" throughout the world. Defendants are well known for spending most if not all of their assets in promoting MELANIE and other forms of entertainment. Such funds if transmitted to defendants MELANIE, PETER and AMELANIE MUSIC will be transferred out of New York. If such

transfer is permitted, plaintiff KAMA RIPPA will lose all control over any funds in New York which could be used to satisfy a judgment herein. KAMA RIPPA, would, therefore, levy in the offices of both Robert L. Casper, P.C., located at 1780 Broadway, New York, New York and KAMA RIPPA MUSIC, INC., located at 810 Seventh Avenue, New York, New York.

17. Plaintiff has no recourse but to move for this Attachment. Defendants, as aforesaid, are without the State. This INFORMATION IS BASED UPON OUR EMPLOYMENT DEALINGS WITH DEFENDANTS Furthermore, upon information and belief, defendants' assets are 2nd without the State. The only assets which plaintiff has been able to locate from which KAMA RIPPA might secure satisfaction of a judgment are those monies held in New York by KAMA RIPPA and Peter Thall, Esq.

18. Time is of the essence. Defendants will be paid said $80,000 (of which $75,000 is owed plaintiff) in the upcoming week, and, judging by past actions of defendants, remove such proceeds and other assets from New York in an attempt to avoid payment of monies owed plaintiff pursuant to the Agreement as well as ancillary damages arising from defendants' breach thereof. Plaintiff is clearly owed $75,000. The funds are just adequate to secure said sum which KAMA RIPPA seeks to attach by this application.

19. The amount stated herein is due KAMA RIPPA which, on information and belief, is over and above all counterclaims known to KAMA RIPPA at this time.

20. No previous application for this relief has been made to any court or judge.

21. Deponent respectfully requests that the relief sought herein be granted.

/s/
HARLEY I. LEWIN

Sworn to before me this
17th day of September, 1973

Notary Public

MARLENE [illegible] LINDER
Notary Public, State of New York
No. 31-[illegible]500
Qualified in New York County
Certificate Filed in [illegible] County
Commission Expires March 30, 1974

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

19A

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KAMA RIPPA MUSIC, INC.,

Index #16516/73

Plaintiff,

AFFIDAVIT

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

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STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

MARTIN GARBUS, Esq., being duly sworn, deposes and says:

1. I submit this affidavit in opposition to the Motion to Vacate the Order of Attachment.

2. Defendants' affidavits are full of misstatements of law and fact. We will seek to deal with them in this affidavit, the affidavit of Harley I. Lewin, Esq., the affidavit of Joseph E. Zynczak, Esq., the affidavit of Marlene H. Linder, and the affidavit of Arthur Kass, the President of Buddah Records, Inc.

3. We will first deal with defendants' claims that the attachment was improper because defendants are neither residents or domiciliaries. We will thereafter deal with the remainder of defendants' claims, none of which require a substantial rebuttal.

4. We will in this affidavit refer to the documents annexed to defendants' moving papers and the documents that are

annexed hereto. Defendants have made mention of previous litigation and agreements between the parties and in order to aid the Court, we will not go through a lengthy restatement except where defendants' remarks are false.

I. DEFENDANTS CLAIM THAT THEY ARE NEITHER RESIDENTS NOR DOMICILIARIES

5. Defendants previously admitted residence in New Jersey. Plaintiff's complaint in the action filed in January of 1971 (a copy of which is annexed hereto) claimed that Peter Schekeryk and Melanie Schekeryk were residents of the State of New Jersey. Defendants' answer admits this.

6. Plaintiff's complaint states: "Upon information and belief Peter Schekeryk and Melanie Schekeryk are residents of the State of New Jersey and do business in the State of New York and are the principals of Amelanie Music and Two People Music."

7. Defendants' answer admits that Peter Schekeryk and Melanie Schekeryk are residents of the State of New Jersey. The answer states: "Admit the allegations contained in Paragraphs Fourth, Fifth and Seventh of the Complaint, except deny that the answering defendants maintain their principal place of business at 1650 Broadway, New York, New York."

8. Buddah Records, Inc. has for years been dealing with Melanie and Peter Schekeryk. Representatives of Buddah Records, Inc. have been in the Schekeryks' home in New Jersey and can testify that that is where they live. Melanie's former manager will testify that the Schekeryks reside in and are domiciled in New Jersey. We have always contacted Melanie Schekeryk through

her New York attorneys and have always known of her New Jersey abode.

9. The residence situation with the Schekeryks is the same today as it was in 1971 when they admitted their New Jersey residence. At the time that defendants were under contract with Buddah Records, Inc., their related companies had offices inthe same building as Buddah Records, Inc. Melanie rarely was there. Neither Peter nor Melanie lived there. Peter did come and go.

10. Peter and Melanie Schekeryk live at 20 Rimwood Drive, Lyncroft, New Jersey. It is their home and those who know them, including our client, have known that they have lived there. The house in New Jersey has a children's room because Melanie is pregnant, a pool and large servant's quarters. Peter and Melanie have had a series of full time servants at their New Jersey home. Melanie has just purchased a second home in New Jersey. The Schekeryks' automobiles, a Mercedes-Benz and a Rolls Royce, bear New Jersey license plates. Prior to the time that they were living at their own New Jersey residence, defendants resided with Melanie's parents, also in New Jersey. In addition, their publishing company, we believe, recently ran and ad in Billboard Magazine, indicating the business was being conducted in New Jersey, listing a New Jersey telephone number.

11. As noted in the affidavit of Harley I. Lewin, Esq., submitted herewith, a search of the records was made in New York and not one shred of evidence was discovered showing that the Schekeryks conduct business in New York, much less live therein. At this office's request, Republic Corporate Services, Inc. con-

ducted a search of the New Jersey records and discovered that Neighborhood Records Corp. was incorporated on February 29, 1972 and lists Long Branch, New Jersey as its offices. It has another office in New York at the Gulf and Western Building. Schekeryk Enterprises Ltd. was incorporated on October 23, 1970 and uses the Corporation Trust Company as agent, located in Jersey City, New Jersey. There is a phone at the New Jersey address. Amelanie Music, a named defendant herein, appears to be totally fictitious and does not exist in New York and New Jersey.

12. Annexed hereto as an Exhibit is a copy of a document furnished to us by the U.S. Marshall for the Southern District of New York who attempted service on Peter Schekeryk. He was advised that there was no one home at the time but that there was in charge a caretaker. We understand that both Schekeryks individually file income tax returns from the State of New Jersey and have a New Jersey phone listed under the number 222-8788.

13. The alleged New York apartment is in fact a business office for one of the Schekeryk related corporates entitled A. Schekeryk Enterprises. There is no personal phone number for either of the Schekeryks at that business office. Melanie does not have a private phone listing at any New York office. The existence of these offices does not mean either Schekeryks are residents or domiciliaries here. 200 Central Park South, New York, New York is not living quarters in the same sense that the New Jersey residence is. For example, as the lease indicates on its last page:

> "It is understood and agreed that
> no washing machines, no laundry machines

or dryers were permitted to be used or installed in the demised apartment."

14. Annexed hereto as an Exhibit, as additional proof of the fact that defendants reside in and are domiciled in New Jersey, is a copy of an article taken from the New York Post of October 5, 1973, noting that Melanie had given birth to a child and that defendants live in New Jersey.

15. Defendants make mention of their involvement with Famous Music and indicate that they have an office there. We understand it to be incorrect. There is an office for a corporation headed by defendant Peter Schekeryk. This is a New Jersey corporation. Melanie Schekeryk does not even have an office. Annexed hereto is an affidavit from Marlene H. Linder, an employee of this office, made after investigating the foregoing.

16. Prior to the time that Melanie switched from Buddah Records, Inc. to Paramount, there were similar offices in the Buddah building for the production companies. They were never offices for Melanie - rather they were for the corporate entities that represent her interests. The fact that Melanie and Peter get mail there is not significant - they also used to get it at Buddah Records, Inc. She is a well known star and gets fan mail, we suspect, at many places.

II. DEFENDANTS' CLAIM OF BAD FAITH

17. Defendants' argument that we failed to advise the Court of relevant counterclaims or a previous relevant law suit is false.

18. This case is based upon an interpretation of the August 24, 1971 Settlement Agreement. It is not based on the agreements that give rise to the 1971 litigation. That Agreement is, according to its terms as interpreted by defendants, a self sufficient document. It sets forth obligations, responsibilities of various parties. It sets forth Melanie Schekeryk's obligation with respect to recordings and sets forth Buddah's obligations with respect to them also. The agreement ends by stating:

> "This Agreement and all rights and obligations of the parties hereunder shall be construed and enforced under the laws of the State of New York, United States of America, where this Agreement has been or is being deemed made.
>
> This Agreement cannot be modified, changed or discharged except by writing duly executed by the parties hereto with the same formality as this Agreement. No waiver by any party hereto, whether express or implied, of any provisions of this Agreement or of any breach or default of any party, shall constitute a continuing waiver of such provisions or of a waiver of any other provision or provisions of this Agreement and no such waiver by any party shall prevent such party from enforcing any and all provisions of this Agreement, or from acting upon any subsequent breach or default of any other party, under any provisions of this Agreement."

19. There are no counterclaims that we know of to this action. Buddah Records, Inc. has complied in every way with the August 24, 1971 Agreement.

20. Annexed hereto as an Exhibit is a copy of the complaint we filed in the previous New York litigation, and a copy of the Settlement Agreement. As that Settlement Agreement

indicates on Page 3, Paragraph 4, Buddah retained its Ninth Cause of Action and its Tenth Cause of Action, one of which seeks equitable relief and the other one which seeks Three Million Dollars worth of damages.

21. Hence, even if reference to that litigation were relevant, and it is not, then defendants' allegations are still false and misleading because our claims substantially exceed theirs. However, neither parties since the date of the Settlement has done anything at all with respect to the litigation.

22. Defendants are raising from the dead a law suit filed several years ago. The answer, a copy of which is annexed to defendants' moving papers, is dated April 30, 1971. It is hard to see how an answer asserted prior to August 24, 1971 relating to a different agreement can possibly effect the August 24, 1971 agreement and a breach thereof in 1973.

23. Defendants misstate the 1971 litigation and its ending. First we note that nothing has been done with respect to that answer since it was filed other than a settlement of the law suit. Not one single paper has been filed by the defendants in support of their alleged $2,000,000 claim. Defendants' claim was never taken seriously, was never seriously asserted at the negotiations and in fact is made entirely of thin air. The best proof of that is that nothing has been done in the last thirty months with respect to that issue.

24. We advised the Court at Special Term Part II that no application for this relief had been made to any Court or Judge. This is true. An attachment was never sought in the

Federal Court nor was any other provisional remedy ever sought in the Federal Court. In fact, the complaint in the Federal Court had not been served as of September 18, 1973, the date that Judge Waltemade issued the Order in this particular case. Furthermore, based on the allegations being made in defendants' affidavit that they could assert in the Federal Court that it does not have jurisdiction because there is no diversity. Hence, there would not be two actions pending. In any event, if we can obtain jurisdiction in this case over all the necessary parties, then we would immediately discontinue the Federal action.

25. The Attachment is valid in all respects and defendants' motion should be denied.

MARTIN GARBUS

Sworn to before me this
5th day of October, 1973.

Notary Public

ANN E. MENDELSON
NOTARY PUBLIC, State of New York
No. 31-2658865
Qualified in New York County
Commission Expires March 30, 1975

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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BUDDAH RECORDS, INC., KAMA RIPPA MUSIC, INC., and KAMA-SUTRA PRODUCTIONS, INC.,

Plaintiffs,

- against -

PARAMOUNT RECORDS, INC., a division of FAMOUS MUSIC CORP., AMELANIE MUSIC CORP., TWO PEOPLE MUSIC, PETER SCHEKERYK ENTERPRISES, LTD., NEIL RESHIN, WILLIAM GALLAGHER, PETER SCHEKERYK and MELANIE SCHEKERYK,

Defendants.

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Exhibit A

VERIFIED COMPLAINT

Plaintiffs, by their attorneys, complaining of the defendants, respectfully allege:

AS AND FOR PLAINTIFFS' FIRST CAUSE OF ACTION

FIRST: Plaintiffs, Buddah Records, Inc., Kama Rippa Music, Inc. and Kama-Sutra Productions, Inc. are corporations organized and existing under the laws of the State of New York with their principal place of business at 1650 Broadway, in the City, County and State of New York. They are jointly owned and controlled by Viewlex, Inc., a New York corporation. All three corporations are hereinafter referred to as the "Buddah Companies".

SECOND: Upon information and belief defendant, Paramount Records, Inc., is a division of Famous Music Corp.

and they are both Delaware corporations that do business and maintain offices in the City, County and State of New York. These corporations are hereinafter referred to as "Paramount".

THIRD: Upon information and belief, defendants Neil Reshin and William Gallagher are employees of Famous Music Corp. and they both do business in the City, County and State of New York.

FOURTH: Upon information and belief defendant, Amelanie Music is a partnership organized and existing under the laws of the State of New York and it does business in the City, County and State of New York and maintains a principal place of business at 1650 Broadway, New York, New York.

FIFTH: Upon information and belief defendant, Two People Music is a partnership organized and existing under the laws of the State of New York and it does business and maintains an office at 1650 Broadway, City, County and State of New York.

SIXTH: Upon information and belief defendant Peter Schekeryk Enterprises Ltd. is a corporation organized and existing under the laws of the State of New York with its principal place of business at 1650 Broadway, City, County and State of New York.

SEVENTH: Upon information and belief Peter Schekeryk and Melanie Schekeryk are residents of the State of New Jersey and do business in the State of New York and are the Principals of Amelanie Music and Two People Music.

EIGHTH: Upon information and belief Peter Schekeryk and Melanie Schekeryk are the principal stockholders and owners of those partnerships and corporate entities which are controlled by the Schekeryks. They will hereinafter be referred to as the "Schekeryk Companies".

NINTH: Prior to January 1st, 1970, the Schekeryk Companies and Melanie Schekeryk and Peter Schekeryk, individually, entered into various contracts with the Buddah Companies. These contracts are hereinafter referred to as the "Artist's Contract" (Exhibit A), the "Songwriter's Agreement" (Exhibit B), and the "Co-Publishing Agreement" (Exhibit C).

TENTH: Pursuant to the foregoing Artists' Contracts, Melanie Schekeryk agreed for a valid consideration, among other things, to record and write songs and the Buddah Companies agreed to manufacture, distribute, sell and promote her recordings and songs. The Artists' Contract, signed on October 28th, 1968, was for one year and plaintiff had the option to renew the contract for two additional year periods which options plaintiff exercised.

ELEVENTH: Prior to the time Melanie Schekeryk signed her 1968 agreement with plaintiffs, she was relatively unknown. By reason of the Buddah Companies' efforts as hereinafter described, including the large expenditure of funds, promotional efforts, personal attention by major executives, press activities helping her with concerts, bookings, etc., a substantial

contribution was made to the present large sales of her phonograph records and songs and the creation of a market for records by Melanie Schekeryk.

TWELFTH: Melanie Schekeryk is a musician of an unique and extraordinary kind. Her style of singing, her songwriting and musical mannerisms and her performances are inimitable. Her recordings and performances have made a favorable impression upon the record buying public who have purchased thousands of her phonograph records and have acknowledged her as a unique, outstanding artist in the popular recording field. Over the past years, she has been inextricably linked to the Buddah Companies. She possesses such unique and extraordinary ability that she cannot be replaced by Buddah and by reason thereof her services are much sought after.

THIRTEENTH: On or about January 1970, the Buddah Companies on the one hand and the Schekeryk Companies and Melanie and Peter Schekeryk on the other, began negotiations towards a new Artist's Contract.

FOURTEENTH: Prior to January 1970 and thereafter, Peter Schekeryk, the husband and agent and representative of Melanie Schekeryk (he is also her producer) and of the Schekeryk Companies, stated, and Melanie Schekeryk agreed that a new Artist's Contract would be signed between the Buddah Companies and the Schekeryks and their corporations. There was agreement as to the basic provisions of the new contracts to be signed.

FIFTEENTH: Plaintiffs, pursuant to said agreement and the written agreements between the parties, and because the Schekeryks promised to renew their agreements, spent prior to January 1970, in excess of Five Hundred Thousand ($500,000) Dollars in promoting and recording and publicizing the activities and phonograph records of Melanie Schekeryk.

SIXTEENTH: As a result, it has become known in the record industry that the Buddah Companies were the exclusive manufacturers and producers, promoters and source of supply for phonograph records embodying her performances and that the Buddah Companies had chosen Melanie Schekeryk as one of its most significant singers and writers of songs and had staked large sums of money and time and effort on her success, monies that could have been spent for other artists.

SEVENTEENTH: In the months after January 1970, Melanie and Peter Schekeryk agreed to a new Artist's Contract for Melanie Schekeryk.

EIGHTEENTH: As a result of the foregoing, an additional Three Hundred Thousand ($300,000) Dollars was spent on advertising, recording, and promotion.

NINETEENTH: Thereafter Peter Schekeryk, individually and on behalf of Melanie Schekeryk and the Schekeryk Companies agreed to sign a written agreement confirming the oral understanding arrived at with the Buddah Companies and on or about October 15th, 1970, such a written Artist's Contract dated June 1st, 1970, was signed. A copy of that contract is annexed hereto as Exhibit D.

TWENTIETH: Thereafter in October 1970 the defendants, Reshin, Gallagher and Peter Schekeryk acting on behalf of and at the direction of the defendant Paramount in furtherance of a conspiracy to induce a breach, wrongfully, knowingly, maliciously and without reasonable justification and excuse, induced, persuaded and enticed Melanie Schekeryk to violate, repudiate and breach her October 28th, 1968, Artist's Contract (Exhibit A) in which the options had been exercised and her new Artist's Contract (Exhibit D), with plaintiffs and to enter into a contract with Paramount for the production, manufacture, distribution, and sale of phonograph records embodying performances of the aforesaid Melanie Schekeryk. Each of the defendants had full knowledge of the previous negotiations and acts of the parties as previously alleged.

TWENTY-FIRST: Thereafter Gallagher, Reshin and Paramount on or about November 1, 1970, announced to the trade press, public and mutual licensees and distributees that they had signed contracts with the Schekeryks. This was announced the year before the Paramount agreement allegedly began. These contracts, upon information and belief, were signed after the oral and written agreements (Exhibit D) were entered into between the Buddah Companies and the Schekeryks. The Buddah Companies were never given notice of these signed contracts and never knew of them until they heard about it from third parties.

TWENTY-SECOND: Plaintiffs have no adequate remedy at law and seek equitable relief compelling Melanie Schekeryk to

comply with her oral and written agreements (including Exhibits A, B, C and D) with the Buddah Companies.

AS AND FOR PLAINTIFFS' SECOND CAUSE OF ACTION

TWENTY-THIRD: As the result of the foregoing breaches of contract by Melanie Schekeryk and Peter Schekeryk and the Schekeryk Companies, plaintiffs have been damaged in the sum of Five Million ($5,000,000) Dollars.

TWENTY-FOURTH: As a result of the foregoing, plaintiffs seek damages in the sum of Five Million ($5,000,000) Dollars.

AS AND FOR PLAINTIFFS' THIRD CAUSE OF ACTION

TWENTY-FIFTH: As a result of the foregoing the Buddah Companies have been damaged and will be damaged in an amount that is not presently known to Buddah Companies.

TWENTY-SIXTH: Plaintiffs have no adequate remedy at law and seek equitable relief.

AS AND FOR PLAINTIFFS' FOURTH CAUSE OF ACTION

TWENTY-SEVENTH: As a result of the foregoing acts of the defendants Reshin, Gallagher and Famous, each of which were fraudulent, wilfull and malicious, and with intent to injure plaintiffs the Buddah Companies seek damages in the sum of Nine Million ($9,000,000) Dollars.

AS AND FOR PLAINTIFFS' FIFTH
CAUSE OF ACTION

TWENTY-EIGHTH: The abrupt and unexpected announcement on or about November 1st, 1970, that Melanie Schekeryk (without any forwarning to the Buddah Companies and with the knowledge that the Buddah Companies were relying on its contract with the Schekeryks and their entities)was now exclusively released through Paramount and that Melanie's records were no longer to be distributed by plaintiffs affected specific third party contracts, relating both to domestic and international agreements, some of which were made in reliance upon the Schekeryk's continued relationship with the plaintiffs, and has undermined the confidence of distributors and others doing business with Buddah and has affected the credibility of Buddah and its employees.

TWENTY-NINTH: By reason of these wrongful acts, the Buddah Companies' ability to compete with defendant Paramount and other independent record companies in the production, manufacture, distribution and sale of phonograph records throughout the United States was greatly impaired.

THIRTIETH: The foregoing acts of Paramount constitute unfair competition.

THIRTY-FIRST: By reason of the foregoing, the Buddah Companies suffered damages in the amount of Two Million ($2,000,000) Dollars.

AS AND FOR PLAINTIFFS' SIXTH CAUSE OF ACTION

THIRTY-SECOND: By reason of the foregoing, the Buddah Companies invested large amounts of money and time in promoting Melanie Schekeryk; monies they could have used to promote other of their artists. The time and monies they spent were a disporportionately large percentage of the available money and time, and they, as a result, have not promoted other artists that they would have if the monies were available to them for that use, and, as a result, they have been damaged in the amount of Three Million ($3,000,000) Dollars.

AS AND FOR PLAINTIFFS' SEVENTH CAUSE OF ACTION

THIRTY-THIRD: At all times hereinafter mentioned, plaintiffs were and still are an "independent" record company engaged in the manufacture, distribution and sale of phonograph records throughout the United States. Buddah also engages in the publishing and mechanical licenses of musical compositions and performances throughout the United States.

THIRTY-FOURTH: Paramount, Gallagher, Reshin and Peter Schekeryk, during 1970, approached many of Buddah's key employees including Neil Bogart, Jerry Scharell, national promotion director, and Ron Weisner, director of artists relations, in an attempt to induce them to breach their employment contracts with the Buddah Companies and in an attempt to employ them at Paramount and companies controlled by Paramount.

THIRTY-FIFTH: The purpose of Paramount, Reshin, Gallagher and Peter Schekeryk in making these inducements was not only to hire the Buddah individuals for Paramount and companies controlled by them, but to obtain Buddah's trade secrets and to destroy Buddah as hereinafter alleged.

THIRTY-SIXTH: Phonograph records of the independent record companies are generally sold through a system of independent franchised distributors in the various cities and states of the United States. It is, therefore, extremely important that an independent company develop a highly efficient distribution system and creative promotional and sales program and one that has credibility in the eyes of the business people it deals with as well as the public at large. There is intense competition among the independent record companies for the distribution favor since complete lines of records are not offered as in the case of the vertically integrated companies and since such distributors have limited physical and financial capacities to handle record lines. Therefore, maintaining its relationship with its distributors is of extreme importance to the independent company. Losing the Melanie Schekeryk records and injuring the relationship with the distributors means that the distributors will purchase fewer of Buddah's other recordings.

THIRTY-SEVENTH: In addition to the foregoing manufacture and distribution of phonograph records many of the independent companies engage in activities as music publishers

whereby they own and control the rights to musical compositions released on, not only its phonograph records, but also these compositions are released on other company's records. This aspect of the record business is equally as competitive as the manufacture and distribution of the records themselves and maintaining good relationships with its customers is a paramount concern.

THIRTY-EIGHTH: The Buddah Companies' employees by reason of their employment with plaintiffs, gained full knowledge of the operation of plaintiffs' business, its mode of production and manufacturing, its source of supply, its record distributors, its music publishing operation and its contractual relationships with its recording artists as well as other trade and business secrets of the plaintiffs.

THIRTY-NINTH: The defendants Reshin and Gallagher as hereinbefore alleged conspiring together acted maliciously, wilfully and wrongfully and entered into a scheme to economically destroy plaintiffs' operation in the record and music publishing business and to destroy Buddah's relationships with its distributor intended, as part of their scheme, to sign other Buddah artists in order to eliminate plaintiffs as a competitor of the defendant, Paramount, and by said elimination, to seek materially to diminish the existing competition between said independent record companies in the record industry.

FORTIETH: By reason thereof, the Buddah Companies suffered damages in the amount of Two Million ($2,000,000) Dollars.

AS AND FOR PLAINTIFFS' EIGHTH CAUSE OF ACTION

FORTY-FIRST: The Buddah Companies had advised their distributors that Melanie Schekeryk was, for the next years, under an exclusive recording arrangement with plaintiffs. The announcement in the press by the conspirators (Paramount, Reshin, Gallagher and Peter Schekeryk) that this was not so placed Buddah in the position of apparently having mislead them. This was intended to, and succeeded, in seriously impairing the Buddah Companies' relationships with its distributors and other parties with whom Buddah does business.

FORTY-SECOND: As a result of the foregoing, the Buddah Companies have been damaged in the sum of One Million ($1,000,000) Dollars.

AS AND FOR PLAINTIFFS' NINTH CAUSE OF ACTION

FORTY-THIRD: On or about May 31, 1968, plaintiffs entered into a written songwriting and co-publishing agreement with the defendant, Melanie Schekeryk (copies of which are annexed thereto and marked Exhibits B and C and made a part hereof). Pursuant to the terms thereof, the Schekeryk Companies agreed to furnish to plaintiffs sixty (60) songs written by Melanie Schekeryk over the period of the contracts and agreed, pursuant to the Co-publishing Agreement, to co-publish with the Buddah Companies all rights to songs that the Schekeryks or their corporations obtained.

FORTY-FOURTH: These defendants at the instigation of Paramount and its employees have refused to furnish the songs they were required to furnish under the Songwriting Contract and has refused to furnish the songs they were required to furnish under the Co-publishing Agreement although due demand has been made.

FORTY-FIFTH: The plaintiffs have duly performed all the conditions under the aforesaid agreement with the defendants herein on its part to be performed and at all times has been and now is ready and willing to perform all conditions of said agreement on its part.

FORTY-SIXTH: Plaintiffs have no adequate remedy at law.

AS AND FOR PLAINTIFFS' TENTH CAUSE OF ACTION

FORTY-SEVENTH: As a result of the conduct set forth in the Ninth Cause of Action, the Buddah Companies have been damaged by virtue of a breach of contract in the sum of Three Million ($3,000,000) Dollars.

AS AND FOR PLAINTIFFS' ELEVENTH CAUSE OF ACTION

FORTY-EIGHTH: Upon information and belief the defendant, Paramount, intends to manufacture, distribute and sell or cause to be manufactured, distributed or sold, phonograph recordings embodying performances and songs of Melanie Schekeryk in violation of the rights of the plaintiffs.

FORTY-NINTH: By reason of the foregoing, plaintiffs will suffer substantial and irreparable harm by being deprived of its rights to the exclusive recording and writing services of Melanie Schekeryk and its reputation and standing in the phonograph record industry as a leading independent producer and distributor of phonograph records embodying performances of top name and outstanding artists in the phonograph field, will be greatly diminished and irreparably damaged.

FIFTIETH: Plaintiffs have no adequate remedy at law.

AS AND FOR PLAINTIFFS' TWELFTH CAUSE OF ACTION

FIFTY-FIRST: By reason of the aforesaid conduct, plaintiffs will have been damaged in an amount to be determined.

WHEREFORE, plaintiffs demand judgment against the defendants as follows:

1. On the first, third, seventh, ninth and eleventh causes of action, judgment against the defendants Peter and Melanie Schekeryk and the Schkeryk Companies compelling them to perform all of her contractual obligations with the Buddah Companies and permanently enjoining Paramount, its agents, servants, and attorneys and each and every one of them from manufacturing, distributing or selling phonograph records containing the performances of Melanie Schekeryk.

2. On the second cause of action, judgment against the Schckeryks individually and their Companies for damages in an amount approximating Five Million ($5,000,000) Dollars.

3. On the first, third, seventh, ninth, eleventh and twelfth causes of action, judgment declaring the rights of the parties to the contract with Buddah and for an accounting from each of the defendants to determine the amount lost by the Buddah Companies.

4. On the fifth cause of action, judgment in the sum of Two Million ($2,000,000) Dollars.

5. On the sixth cause of action, judgment against Paramount in the sum of Three Million ($3,000,000) Dollars.

6. On the seventh cause of action, judgment against all of the defendants in the sum of Two Million ($2,000,000) Dollars.

7. On the seventh cause of action, a judgment enjoining pendente lite and permanently enjoining the defendants, their agents, attorneys, servants, employees and each and every one of them, from engaging in and continuing to engage in unlawful acts of unfair competition and interfering with the contractual relationships of plaintiffs' employees and the contractual relationship of various Buddah artists.

8. On the eighth cause of action, judgment against all of the defendants in the sum of One Million ($1,000,000) Dollars.

9. On the tenth cause of action, judgment in the sum of Three Million ($3,000,000) Dollars.

10. Together with the costs and disbursements of this action, including counsel fees and such other and further relief as to this Court may seem just and proper.

Dated: New York, N.Y.
January , 1971

WEIL, KOBRIN, KLEIN & CARBUS
32 East 57th Street
New York, New York 10022
Attorneys for Plaintiffs

42A **Exhibit B**

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

PLAINTIFF: MANA RIPTA MUSIC, INC.
COURT NUMBER: 73 Civ 3789
DEFENDANT: MS. MELANIE SCHLOSSER, et ano., etc.
TYPE OF WRIT: Subpoena

SERVE / AT
NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN: MELANIE SCHLOSSER
ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code): 20 Ridgewood Drive, Lyncroft, New Jersey 07738

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

EMIL, KOBRIN, KLEIN & GARBUS
540 Madison Avenue
New York, New York 10022

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc.: NO. 1 OF TOTAL 1

CHECK IF APPLICABLE.
☐ One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

#6.36 Please mail

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR | TELEPHONE NUMBER | DATE 8/31/73

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable fe) and sign USM 285 for first writ only if more than one writ submitted.	DEPOSIT/CODE	DIST. OF ORIGIN	DISTRICT TO SERVE	LOCATION OF SUB OFFICE OF DIST. TO SERVE
I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown.	SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK			DATE 9/6/73

☐ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above) | ☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode.

ADDRESS (Complete only if different than shown above) | FEE (If applicable) $ | MILEAGE $ —

DATE(S) OF ENDEAVOR (Use Remarks if necessary)	DATE OF SERVICE	TIME AM PM	SIGNATURE OF U. S. MARSHAL OR DEPUTY
9/10/73			

REMARKS:

Enter 9/10/73 - 90 miles : $10.80 - Process sent out Carteleer - wife she did not know where defendants were but should been attorney Samuel Frankel in N.Y. who stated that he would accept service - was also contacted and did not know their whereabouts. Attorney Samuel Frankel's address is 225 Broadway, N.Y.C. N.Y. Process served. [illegible] 9/13

USM-285 (Rev. 7-1-70) 3. NOTICE OF SERVICE

Exhibit C

Melanie's Baby

NEPTUNE, N. J. (AP)—Rock star Melanie gave birth to her first child yesterday and named the baby Layla, after an album recorded by Derek nd the Dominoes.

Melanie, who lives near here with her husband, Peter Schekeryk, became famous singing "Brand New Key," which she wrote. Her other hit records included "What Have They Done to My Song, Ma?" and "Candles in the Rain."

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Exhibit D

44A

BUDDAH RECORDS, INC., KAMA RIPPA MUSIC, INC., and KAMA-SUTRA PRODUCTIONS, INC.,

Plaintiffs,

-against-

PARAMOUNT RECORDS, INC., a Division of Famous Music Corporation, AMELANIE MUSIC CORP., TWO PEOPLE MUSIC, PETER SCHEKERYK ENTERPRISES, LTD , NEIL RESHIN, WILLIAM GALLAGHER, PETER SCHEKERYK and MELANIE SCHEKERYK,

Defendants,

PARAMOUNT RECORDS, s/h/a Paramount Records, Inc., a Division of Famous Music Corporation, and WILLIAM GALLAGHER,

Defendants-Counterclaimants,

-against-

BUDDAH RECORDS, INC., KAMA RIPPA MUSIC, INC. and KAMA-SUTRA PRODUCTIONS, INC.

Settlement Agreement

Plaintiffs-Counterdefendants,

NEIL BOGART,

Counterdefendant.

AMELANIE MUSIC, TWO PEOPLE MUSIC, SCHEKERYK ENTERPRISES, LTD., PETER SCHEKERYK and MELANIE SCHEKERYK,

Defendants-Counterclaimants,

-against-

BUDDAH RECORDS, INC., KAMA RIPPA MUSIC, INC. and KAMA- SUTRA PRODUCTIONS, INC.,

Plaintiffs-Counterdefendants,

NEIL BOGART and VIEWLEX, INC.

Counterdefendants.

WHEREAS, on or about January 27, 1971, plaintiffs (hereinafter referred to as the "BUDDAH GROUP") commenced the above-captioned action; and

WHEREAS, the BUDDAH GROUP has alleged certain claims against defendants in the action and seeks therein to recover damages and equitable relief; and

WHEREAS, defendants, except Neil Reshen, who has not been served with the summons and complaint, have denied the material allegations of the complaint and have set up and asserted separate and complete affirmative defenses to the complaint; and

WHEREAS, defendants, except Neil Reshen, have further asserted various counterclaims against plaintiffs and counterdefendants Neil Bogart and Viewlex, Inc.; and

WHEREAS, it is the desire of the parties to terminate and settle the action completely as and between the plaintiffs and PARAMOUNT RECORDS, WILLIAM GALLAGHER, and NEIL RESHEN, (hereinafter referred to as the "PARAMOUNT GROUP") and it is the desire of the parties to terminate the action partially as between plaintiffs and AMELANIE MUSIC CORP., TWO PEOPLE MUSIC, SCHEKERYK ENTERPRISES, LTD., PETER SCHEKERYK and MELANIE SCHEKERYK:

NOW, THEREFORE, it is hereby stipulated and agreed:

(1) BUDDAH RECORDS, INC., KAMA RIPPA MUSIC, INC., and KAMA-SUTRA PRODUCTIONS, INC. discontinue on the merits without costs and with prejudice any and all claims asserted against the defendants, PARAMOUNT RECORDS, WILLIAM GALLAGHER and NEIL RESHEN.

(2) PARAMOUNT RECORDS and WILLIAM GALLAGHER discontinue on the merits without costs and with prejudice any and all counterclaims asserted against plaintiffs and NEIL BOGART.

(3) MELANIE SCHEKERYK, PETER SCHEKERYK, AMELANIE MUSIC, TWO PEOPLE MUSIC, and SCHEKERYK ENTERPRISES, LTD., (hereinafter referred to as the MELANIE GROUP) discontinue on the merits without costs and with prejudice, any and all counterclaims asserted against plaintiffs and counterdefendants NEIL BOGART and VIEWLEX, INC., except with respect to the second, third and fourth counterclaims hereby limited solely to plaintiffs, and except that the action is discontinued with respect to those claims set forth in subsections "c" and "d" of paragraph 48 of the "Fourth" counterclaim against plaintiffs.

(4) Plaintiffs discontinue all claims against the MELANIE GROUP except with respect to those claims asserted upon the Songwriter's Agreement (Exhibit B to the Complaint) and the Co-Publishing Agreement (Exhibit C to the Complaint) as set forth in the "Ninth" and "Tenth" causes of action in the Complaint and except that the action is discontinued with respect to those claims set forth in paragraph 44 of the "Ninth" cause of action in the Complaint.

(5) BUDDAH does hereby release, immediately upon the execution of this Agreement, the MELANIE GROUP from any and all obligations further to produce, record or deliver records or master recordings to or for BUDDAH, provided that nothing contained herein shall constitute a waiver of the rights, if any, of the MELANIE GROUP with respect to an accounting under the provisions of the October 28, 1968 contracts.

(6) It is expressly agreed and understood by and between the BUDDAH GROUP, PARAMOUNT and the MELANIE GROUP that no press releases or public statements with respect to any matter contained in this Agreement shall be made by any party hereto except as may be mutually agreed to in writing by plaintiffs, PARAMOUNT RECORDS and PETER and MELANIE SCHEKERYK.

(7) Concurrently with the execution of this Agreement, the parties, by their duly authorized attorneys, have executed in a form suitable for filing, a stipulation discontinuing those causes of action and counterclaims previously discussed, with prejudice on the merits and without costs to any party.

(8) Concurrently with the execution of this Agreement, the signatories to this Agreement have exchanged duly executed releases.

(9) This Agreement is being executed for settlement purposes only and the acceptance and agreement to the terms and conditions of this Agreement is not and shall not be construed as an admission by the BUDDAH GROUP, the PARAMOUNT GROUP, or the MELANIE GROUP of the validity of any of the claims or counterclaims raised in the action or of any liability by the BUDDAH GROUP, the PARAMOUNT GROUP, or the MELANIE GROUP therefor.

(10.) This Agreement, and all the rights and obligations of the parties hereunder, shall be construed and enforced under the laws of the State of New York, United States of America, wherein this Agreement has been or is deemed made.

BUDDAH RECORDS, INC.

BY: _____

48A KAMA RIPPA MUSIC, INC.

BY: _____

KAMA-SUTRA PRODUCTIONS, ,INC.

BY: _____

NEIL BOGART _____

VIEWLEX, INC.

BY: _____ VP

PARAMOUNT RECORDS, A Division of
Famous Music Corporation

BY: _____

WILLIAM GALLAGHER _____

NEIL RESHEN _____

AMELANIE MUSIC

BY: _____

TWO PEOPLE MUSIC

BY: _____

SCHEKERYK ENTERPRISES, LTD.

BY: _____

PETER SCHEKERYK _____

MELANIE SCHEKERYK _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

----------x

– 49A

Index No. 16516/73

AFFIRMATION IN REPLY TO AFFIRMATION IN SUPPORT OF MOTION TO VACATE ORDER OF ATTACHMENT AND LEVIES THEREUNDER

The undersigned, Harley I. Lewin, associated with Emil, Kobrin, Klein & Garbus, attorneys for plaintiff herein, affirms that the following statement is true under penalty of perjury:

1. This affirmation is made in reply to the affirmation submitted by attorney for defendants, Sandor Frankel, to secure an Order To Show Cause returnable October 2, 1973, with respect to a Motion to Vacate the Order of Attachment and Levies Thereunder issued in this matter.

2. Defendants' affidavit in discussing the relationship between the Schekeryks and the recording companies manifest a lack of knowledge of the entertainment business. An artist, such as Melanie, executes an agreement to record exclusively for a particular record company and, more often than not, concurrently executes an agreement whereby such artist agrees to have the publishing arm of the record company (in this case Kama Rippa Music), plaintiff herein, either publish or co-publish songs written and recorded by the artist and released for sale by the public by the record company. Hence, she controls in large part which songs are released.

I. MELANIE'S OBLIGATIONS AND ABILITIES UNDER AGREEMENT DATED AUGUST 24, 1971

3. Paragraph 9 in defendants' affidavit treats the issue at hand, that is, whether the Settlement Agreement provided that Melanie was to record and release not merely record certain compositions, as if the matter had already been settled. Defendants would have this Court believe that (a) Melanie's sole obligation was to record, as she saw fit, three of the twenty compositions which were to be delivered to plaintiff and (b) that Melanie had no control over the release of her compositions. In both cases the matter is fallacious. While a recording of a composition may assist a publishing company in the matter of sale of that composition to other artists it simply is not necessary to have the named artist record such composition. If one were to sell a composition all you really need is demonstration of what the composition might sound like. Every artist adds his own interpretation. there is no need for a full recording of such composition to be made in order to secure the sale thereof. With respect to defendants' statement that Melanie might not be able to control her own recording by virtue of her agreement with Famous Music Corp., nothing could be further from the truth.

4. We believe that Melanie has actually made an agreement with Neighborhood Records, Inc., and that all her recordings made subsequent to her breach of agreement with Buddah Records, Inc., have come out on the Neighborhood Records label as distributed by Famous Music Corporation. We believe that the obligation of Neighborhood Records and/or Melanie to Famous Music is to deliver to them a finished master recording suitable for the manufacture of commercial records. Such being

the case, Melanie and her husband Peter, as her personal manager (and chief executive officer of Neighborhood Records) select the compositions to be performed for her master recordings which would ultimately result in sale by Famous Music Corporation. Melanie certainly was in a position and has been in a position and remains in a position to select the three compositions of the twenty delivered to Kama Rippa Music pursuant to the Settlement Agreement for master recording which recordings would be embodied on those records distributed by Famous Music Corporation on Neighborhood Records label. This is precisely what the parties had in mind when entering into the Settlement Agreement. This is all that plaintiff has insisted on to date.

II. PLAINTIFF IS READY TO PAY ALL ROYALTIES DUE DEFENDANTS.

5. The matter raised in paragraph 10 of Frankel's affidavit does not reach the facts in issue. It simply states that Melanie is entitled to retain her royalties and plaintiff has never disputed that fact. In fact, plaintiff has been ready, willing and able and has made certain attempts to pay defendants' attorney Robert L. Casper all sums due above and beyond the amount attached by Order of the Court. In addition, plaintiff has made efforts to pay the American Guild of Authors and Composers certain monies which would be due defendants Melanie and Peter and Amelanie Music only last week. These attempts were rejected. One of the difficulties in dealing with defendants is often finding out who represents them on what issues.

III. PLAINTIFF'S REPRESENTATIONS IN SECURING THE ORDER OF ATTACHMENT WERE FULL, PROPER AND NOT DECEPTIVE

6. Paragraphs 11, 12 and 13 and in addition paragraphs 16, 17 and 18 of Frankel's affidavit deal with the fact that plaintiff initially filed a summons and complaint in federal court and have now transferred their action to State Court, not

to, as Frankel would have this Court to believe, secure an Order of Attachment, but because counsel felt that state court would be a more appropriate forum for the hearing of this dispute.

7. Paragraph 16 of Frankel's affidavit states that plaintiff by stating that "no previous application for this relief has been made to any Court or Judge" plaintiff's counsel has misled this Court. Frankel's affidavit states that defendants were always available for service and have been available for service and that a combination of the two factors leads to an "acknowledgement by plaintiff that this Court is without jurisdiction." This Court has jurisdiction by virtue of a variety of statutes, including the "long arm statute" just because defendants have numerous business contacts throughout the State and in particular the City of New York. A federal complaint is not an application for provisional relief. We applied for and secured an order of attachment on certain premises and other facts known to plaintiff and plaintiff's counsel and stated to the Court that no other application had been so made. This is the truth and your deponent affirms such truth under penalties of perjury. The affidavit of Martin Garbus, Esq. submitted herewith deals more fully with this issue.

IV. THE COURT CORRECTLY GRANTED THE ORDER OF ATTACHMENT

8. Paragraph 19 of Frankel's affidavit claims the Court erred in granting plaintiff the Order of Attachment on itself and others. First we note that in addition to plaintiff we immediately levied against Mr. Casper, who claims to be defendants' New York agent. He knew plaintiff had funds of the

defendant which in fact were to be delivered. Second, we note that defendants do not claim we withheld facts from the Court, but that the Judge erred. Frankel would have the Court believe that it is strange that plaintiff seeks to levy an attachment on itself and on the attorney acting for defendants and that Judge Waltemade erroneously granted the attachment. Finally, we note that by serving an attachment against plaintiff and Casper we were, for benefit of the defendants, avoiding have to inform third parties of this dispute and the consequent injury to defendants' reputations, which, in view of their present situation would be deleterious to their careers.

9. The purpose of an order of attachment is twofold; (a) to secure assets within the jurisdiction of the Court which may be used to pay a valid judgment when there is reason to believe that those assets will be transferred outside the Court's jurisdiction and that judgment ultimately for a plaintiff would not be satisfied and (b) to have the court secure in rem jurisdiction when jurisdiction over the defendants as in this case, impossible. Your deponent has, on several other occasions, secured orders of attachment against the plaintiff itself which orders have not been challenged. An example of such an order is annexed hereto as Exhibit A. The order is levied where the assets lie. The assets may lie with the plaintiff, the assets may lie with the defendants or the assets may lie with third parties. The order is served to secure those assets wherever those assets may lie, to prevent their transfer outside the jurisdiction of the court. The order is served to secure jurisdiction when the defendants are foreign residents. This is precisely within the policy denegrated by Frankel's affidavit.

10. While defendants' counsel "respectfully submits a rationale" he offers no case law or other substantive information which may serve to refute the entire purpose of an attachment, that is to secure jurisdiction and, certain assets. Your deponent submits that (a) defendants' rationale has no foundation and should be dismissed forthwith and (b) plaintiff's actions fall

precisely within the policies and purposes of such an Order.

11. the footnote contained in paragraph 19 of Frankel's affidavit, regarding Robert Casper, Esq., notes than an attempt was made to deliver monies due to the defendants to his offices per agreement with those defendants. Mr. Casper himself refused both a hand delivery of a check and a delivery of certified mail and both have been returned to plaintiff herein. The obvious reason that Mr. Casper holds no assets is because he refused to, not because the order of attachment was incorrect on its face.

V. PLAINTIFF DOES NOT KNOW WHO, IF ANYONE, IS AUTHORIZED TO ACT ON BEHALF OF DEFENDANTS.

12. Early on in our dealings with Melanie, her alleged representative was the office of Robert Casper. There was a question of whether or not we previously made timely payment under the Settlement Agreement. At some later point their alleged representative was AGAC. On September 20, 1973, Casper advised us that even he did not have authority to accept monies or royalty statements under the Songwriters Agreement and that such payment had to be made directly to Melanie Schekeryk. His letter dated September 20, 1973, now states that Melanie lives at 200 Central Park South. Quite apart from the fact that defendants' lawyer is being childishly self seeking on advising us on September 20th (after Judge Waltemade signed the attachment) that Melanie now lives in New York we point out that even as late as that date she did not have a representative who could make a proper demand under the Settlement Agreement. We have never received a demand from any of the defendants individually for the funds that are the subject of this attachment. Plaintiff, of course, would consent to a delivery of whatever funds it now holds to any person designated by the defendants or the Court

as one who would hold those funds in escrow pending determination of the merits of this suit.

VI. THE AFFIDAVIT SECURING THE ORDER OF ATTACHMENT CORRECTLY STATES PLAINTIFF'S CLAIM

13. Frankel's paragraphs 20, 21 and 22 attempt to impute to plaintiff some other motive in serving the order of attachment as it did. This is simply not the case and is a bald faced attempt to cloud what is a meritorious claim on plaintiff's part. In fact, it may be that no demand has been made by defendant for payment of money due defendants pursuant to Songwriters Agreement. Demand has been made by the American Guild of Authors and Composers to which defendants are signatories and plaintiff is not, that certain payments be made to defendants. We contacted the Guild to determine if they had any signed agreement giving them authority to represent Melanie. They never replied. Plaintiff does not recognize jurisdiction of the AGAC in this matter as plaintiff is not a signatory thereto. As such the "time limits" stated by Frankel simply do not mean what he says they mean. Plaintiff has not constructed a legal defense, as Frankel would have one believe, to the question of reversion of copyrights. If any copyrights are to revert such reversion will have to be decided in a Court of Law. Plaintiff has maintained that Melanie has defaulted under her Settlement Agreement in terms of releasing the three compositions of the twenty delivered to plaintiff. Defendants have maintained and do maintain to this date that they are under no such obligation. That is the issue in this case.

14. In the affidavit securing the Order of Attachment, it was stated clearly that plaintiff intends to and will perform all the terms of the Songwriters Agreement, as amended, with defendants. Plaintiff has not tried to create any defense to the alleged "demand" or possible reversion of copyrights, as Frankel would state, as plaintiff has a further period of time in which to deliver monies due defendants pursuant to its publishing agreements therewith. Mr. Lewis M. Bachman is not a defendant, is not defendants' agent and we believe, plaintiff could be faulted for dealing with him. A demand made by Mr. Bachman is not demand by defendants and bears no weight with plaintiff. Should defendants seek to cause a reversion in copyrights based on the September 24, 1973, cut off date plaintiff will most vigorously defend as no demand has been made which would include such date as a cut off for reversion.

15. Paragraph 26 of Frankel's affidavit states that plaintiff owes defendants royalties for the six month period ending June 30, 1973. Plaintiff does not deny such obligation. As has been previously stated plaintiff attempted to deliver the amounts in excess of $75,000 both to defendants' counsel Robert L. Casper, Esq. and Louis M. Bachman of the American Guild of Authors and Composers. Both parties refused to take a hand delivery of said checks and in addition, both parties have refused to receive certified mail containing such checks.

VII. THE SCHEKERYKS RESIDE IN AND ARE DOMICILED IN NEW JERSEY, NOT NEW YORK.

16. Section 5 of Frankel's affidavit, paragraphs 28 through 34, argues that the jurisdiction for the attachment is

invalid, in that defendants Melanie and Peter maintain an office and/or residence in the City of New York. As the annexed affidavit of Marlene H. Linder shows, we, as of October 1, are led to believe what we have always known, that said defendants do not live in the State of New York. The lease annexed to Frankel's affidavit supports rather than contradicts this contention. "A. Schekeryk Enterprises" bears no relation to the individuals Peter and Melanie Schekeryk nor does it bear any relation to Amelanie Music which, on the admission of Frankel, is simply a fictitious name under which the individual defendants carry on a music publishing business.

17. The office maintained at the Gulf & Western Building is maintained, we believe, pursuant to an agreement between Famous Music Corp. and Neighborhood Records Corporation. Defendant Melanie is not listed on the directory of the Gulf & Western Building and is not listed on the door of Neighborhood Records. In addition, defendant Peter Schekeryk is listed as an executive officer of Neighborhood Records. He does not have his own office. Defendant Peter Schekeryk, according to the personnel of Gulf & Western Industries, rarely if ever spends time at the offices of Neighborhood Records. As such it can hardly be said that the maintenance of a corporate office unrelated to the defendants herein at 1 Gulf & Western Plaza and the maintenance of an office/apartment used solely for business purposes, provides the New York Court with jurisdiction over the individual defendants.

18. Your deponent has made a careful search of the records of New York State. Your deponent believes that neither Melanie nor Peter has filed the appropriate "Certificate of Doing Business Under An Assumed Name" for Amelanie Music. In

addition, your deponent has been unable to locate any other corporate or other form of document relating to Neighborhood Records, A. Schekeryk Enterprises, Amelanie Music Corp. or any other entity bearing the Schekeryk's name and listing their address within New York.

19. The foregoing set of facts completely supports plaintiff's contention that defendants Peter, Melanie and Amelanie are in fact foreign residents and foreign domiciliaries and as such the transfer of funds to them would lead to the transfer of such funds to an office outside the jurisdiction of this Court. An attachment of such funds while in the City of New York and in the jurisdiction of this Court therefore in the face of such facts becomes completely essential not only to secure assets but, more importantly, jurisdiction. The affidavits of Martin Garbus, Esq. and Arthur Kass deal further with this issue.

VIII. PLAINTIFF HAS MORE THAN ADEQUATELY MADE OUT A PRIMA FACIE CASE.

20. Defendants' counsel argues (in section 6, paragraphs 35 through 38 of his affidavit), in substance, that plaintiff has failed to make a prima facie case and, as such, is not entitled to an order of attachment. Frankel argues the language in the Settlement Agreement regarding Melanie's obligation to release to the public three (3) of some twenty (20) compositions delivered to plaintiff seems to be clear on its face and, further, that the Settlement Agreement contains language to the effect that it may not be modified or otherwise changed except in writing. Defendants' counsel misses the point.

21. The facts are as follows;

(1) The plaintiff and defendants settled their differences which differences arose when defendant Melanie Schekeryk broke her contract with Buddah Records and signed contracts with Famous Music Corp.;

(2) That as part of the outstanding Settlement Agreement between the parties, defendants agreed to deliver a certain number of compositions, namely twenty (20), to plaintiff herein and in addition to record three (3) of said compositions for release to the general public;

(3) That defendants have delivered said twenty (20) compositions; and

(4) That defendants have breached the Settlement Agreement by not recording and releasing the three (3) of such twenty (20) compositions.

22. Frankel never reaches the question of why a value of $25,000 was placed on each of the three (3) compositions as a penalty should Melanie fail to record them. A very simple answer is that Melanie's services in demonstrating such recordings were of little or no value and, that the real value comes from release and sale of such records on the assumption that each record would sell enough copies to bring in approximately $25,000 worth of publishing royalties. This, in terms of settling the differences between the parties, is only logical. Prior to Melanie's breach of her Buddah agreement Kama Rippa was assured certain income by virtue of Melanie's Buddah recordings. When Melanie left Buddah she left Kama Rippa. By obligating recording and releasing three (3) compositions controlled by Kama Rippa but released on another label (Neighborhood) Kama Rippa was to at least make back some of the income they lost

by virtue of Melanie's breach. This line of thinking is the only one which makes sense and is the reason for the $75,000 penalty clause. Otherwise such a penalty clause would make no sense. It would in addition be doubly ludicrous to then permit Melanie to select three of the compositions solely for demo purposes.

23. Your deponent has been engaged in the representation of individuals and corporation in all facets of the music business for a number of years. Your deponent can state with assurity that the general understanding of the term "record" within the industry of music is generally taken to mean record and release. (See also the affidavit of Joseph Zynzack annexed hereto). This is particularly true in view of the fact that Melanie controlled the compositions which were to be included on her records as released by Neighborhood Records and distributed by Famous Music Corporation. It is salient to note that Frankel does not, in his affirmation, reach this question at all. Rather, Frankel seeks to call the term "record" a term of art and limit it merely to having Melanie go home and sit in front of a tiny home recorder and sing a song with no other obligation. If this was the understanding of the parties why then not treat all twenty (20) compositions the same? And, in addition, why should the selection of such recordings be left in the hands of Melanie when, at least theoretically, plaintiff was to publish and attempt to sell the tunes? Finally, why is there such a severe penalty clause?

24. Defendants' counsel's concept of the law of evidence is equally limited. The correct rule to apply, in this case, with respect to the interpretation of the August 24, 1971 agreement is known as the "parol evidence rule" which permits

a party to bring in both oral and written evidence in addition to the outstanding agreement in order to explain a word which may be ambiguous or may be disputed as to its meaning by the parties to said agreement. This is precisely what plaintiff is alleging that it is prepared to do and, in the affidavits herein has done.

25. It is not necessary, as Frankel would have this Court to believe, that in making a prima facie case plaintiff's counsel specifies with exactitude the substance of such pre-agreement conversations and other writings and it is further not necessary that such writings be "duly executed by the parties hereto." A modification or change to be in writing does not bear on the dispute in this case since we are not seeking a modification or change in the agreement.

26. It is clear from the position taken here and the position taken by defendants' counsel that two very distinct meanings are being applied to the word "record" and the facts that lead up to the use of that term. The application of the parol evidence rule to explain such ambiguous term is clear. See West v. Aetna Cas. & Sur. Co., 266 N.Y.S.2d 600, 48 Misc.2d 28, modified 280 N.Y.S.2d 795, 28 A.D.2d 745 (1965). Plaintiff must succeed when the Settlement Agreement is read in the light of the understanding reached by all parties in settling their differences and in the light of the general understanding that the music industry holds with respect to the word "record." The introduction of extrinsic evidence to show the intention of the parties is admissible and relevant. Anders v. State, 248 N.Y.S.2d 4, 42 Misc.2d 276 (N.Y. Ct. Cl. 1964).

27. The foregoing is particularly true in view of the argument made above surrounding the imposition of penalty clauses for failure of defendants to record and release such tunes and further the special treatment given three of the twenty tunes so transferred to plaintiff in view of the uselessness of having any particular artist make a "demonstration" of a particular composition.

28. The arguments raised by Frankel deal more with a question of the statute of frauds than they do with parol evidence. As such, Frankel's argument that plaintiff needs to present more evidence than was presented to this Court in order to secure an Order of Attachment is fallacious. It is clear then that plaintiff had, in its presentation to Judge Waltemade, made a case necessary in order to secure such attachment. His order was not wrong; we were not deceitful. Plaintiff has shown that defendants are non-residents, that the assets held by plaintiff and to be delivered to defendants' counsel were the only assets which plaintiff knew of with certainty (which, parenthetically, defendants' counsel never contends) and, further, that plaintiff has a valid cause.

29. Defendants are attempting to place plaintiff in an impossible position. They are trying to claim and will be trying to claim apparently that plaintiff's conduct will cause defendants to lose rights that they have with respect to copyrights. Those rights probably exceed $400,000. Defendants' thrust is to have this Court decide that the attachment was wrongfully granted and on that basis claim that the monies were wrongfully withheld. Plaintiff on the other hand was seeking to protect itself in a situation where it felt that jurisdiction was a major problem and that assets would not be

available as above described. At the very least the critical factor that this Court may feel determinative is the defendants' residence. Plaintiff requests the taking of testimony to prove that defendants are residents of New Jersey and are not domiciliaries of New York.

30. Assuming there were any procedural defects in plaintiff's paper, plaintiff must be given an opportunity to correct such defect. The reason for this is obvious. When the plaintiff seeks an attachment, there are many facts that he cannot possibly know. As Professor Wachtel, the authority relied on by defendants, states, again in his text, at page 194:

> "Upon the motion the court must give the plaintiff a reasonable opportunity to correct any defect." CPLR 6223, See Third Report 358.

30. The attachment should be upheld.

Dated: New York, New York
October 9, 1973

Harley I. Lewin

Exhibit A

At a Special Term, Part II of the Supreme Court of the State of New York, Held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York on the 21st day of December, 1972.

P R E S E N T:

HONORABLE Thomas Dickens

Justice.

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American Talent International Ltd.,

Plaintiff,

-against-

Cory Wells, Charles Negron, Daniel Hutton, Michael Allsup, James Greenspoon, Joe Schermie, Floyd Sneed, individually and as Three Dog Night Inc., Burt Jacobs, Reb Foster Associates, William Morris Agency, Inc.,

Defendants.

ORDER OF ATTACHMENT

Index No. 25280/72

A motion have been made by plaintiff for an Order of Attachment against the property of defendant Three Dog Night Inc., in an action in the Supreme Court, New York County.

NOW, on reading and filing the summons and complaint herein, the affidavit of Harley I. Lewin, Esq., duly sworn to the 14th day of December, 1972, and the exhibits annexed thereto, wherein it appears that a cause of action for a money judgment exists in favor of the plaintiff and against the defendant, for the sum stated in said affidavit, namely, $ 50,000.00.

with interest from the 8th day of November, 1972, and that plaintiff is entitled to recover said sum above all counterclaims known to ~~him.~~ it.

And it being further shown that the plaintiff is entitled to an Order of Attachment against the property of the defendant Three Dog Night Inc., on the ground that said defendant is a foreign corporation whose only assets are moneys due from defendant William Morris Agency Inc. and from plaintiff, itself.

Now, on motion of Emil, Kobrin Klein & Garbus, attorneys for plaintiff, it is

ORDERED, that the plaintiff's undertaking be and the same is hereby fixed in the sum of $5,000.00 of which the sum of $2,500.00 thereof is conditioned that the plaintiff will pay to the said defendant Three Dog Night Inc. all legal costs and damages which may be sustained by reason of the attachment after said defendant recovers judgment or it is finally decided that the plaintiff was not entitled to an attachment of defendant's property and the balance thereof conditioned that the plaintiff will pay to the Sheriff all of his allowable fees and it is further

ORDERED, that the Sheriff of the City of New York, or the Sheriff of any county of the State of New York, levy within his jurisdiction, at any time before final judgment, upon the moneys now in the hands of American Talent International Ltd., 888 Seventh Avenue, New York, N.Y. and defendant William Morris Agency Inc., in which the defendant Three Dog Night Inc. has an interest and upon such debts owed to said defendant as will satisfy the plaintiff's demand of $50,000.00 together with probable interest,

costs and the Sheriff's fees and expenses, and that he proceed herein in the manner required by law.

ENTER: within 10 days

s/ T.D.
J. S. C.

EMIL, KOBRIN, KLEIN & GARBUS
Attorneys for Plaintiff
Office and P. O. Address
540 Madison Avenue
New York, N.Y. 10022
Tel.: (212) 688-6040

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- X

AMERICAN TALENT INTERNATIONAL LTD.,

Plaintiff,

-against-

CORY WELLS, CHARLES NEGRON, DANIEL HUTTON, MICHAEL ALLSUP, JAMES GREENSPOON, JOE SCHERMIE, FLOYD SNEED, INDIVIDUALLY AND AS THREE DOG NIGHT INC., BURT JACOBS, REB FOSTER ASSOCIATES, WILLIAM MORRIS AGENCY, INC.,

Defendants.

- X

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AFFIDAVIT

Index No.25280/72

STATE OF NEW YORK)
ss.
COUNTY OF NEW YORK)

HARLEY I. LEWIN, Esq., being duly sworn, deposes and says:

1. Deponent submits this affidavit in support of the instant application pursuant to Section 6201, et seq. of the Civil Procedure Law and Rules for an Attachment against defendant Three Dog Night Inc., in the amount of $50,000.00. This is the amount of moneys owed and due which are part of the $750,000.00 claimed as damages by defendant pursuant to a complaint dated December 6, 1972 and filed with this court on December 7, 1972. In further support of plaintiff's application herein, plaintiff submits herewith an undertaking for ten (10%) percent of the aforesaid figure.

2. As the summons and complaint annexed hereto as Exhibit A indicate, defendant, Three Dog Night Inc., the corporate shell used by the individual entertainers comprising that professional performing group known as Three Dog Night, is a California corporation. The individual named defendants and those members of the aforesaid Three Dog Night are California residents presently performing in Japan and elsewhere outside the United States.

3. On or about the 4th day of February, 1972, plaintiff, acting in capacity of an artist's booking agent commenced representing defendants pursuant to the terms of an agreement entered into by telegraphic and written communications, copies of said documents are attached hereto as Exhibit B and made a part hereof by reference (hereinafter the "Agreement").

4. Pursuant to the Agreement between the parties, plaintiff commenced booking the individual members of Three Dog Night. Annexed hereto as Exhibit C are copies of plaintiff's records with regard to certain of the bookings made by plaintiff on behalf of defendants as examples of plaintiff's efforts as pursuant to the Agreement. Furthermore, plaintiff, at the specific request of defendants, and at great cost and expense of the plaintiff established and commenced operation of a corporation in the state of California, American Talent International Ltd. of California, in order to better service the defendants herein.

5. After performing all of their obligations pursuant to the Agreement, plaintiff received notification dated November 8, 1972 that defendants, without cause or justification, were terminating the aforementioned Agreement. Copies of said notice of termination are attached hereto as Exhibit D.

6. In its capacity as agent for the individual defendants comprising Three Dog Night and Three Dog Night Inc., plaintiff did collect moneys on behalf of said defendants from various promoters, subtract commission due plaintiff and after said specific dates were played, forward the moneys on to the individual defendants. Pursuant to Agreement between plaintiff and defendants, plaintiff during the entire period when it worked on behalf of defendants did forward one half of its commissions to defendant William Morris Agency Inc. This represented moneys being paid to defendant William Morris Agency Inc. on the understanding that defendants Three Dog Night and Three Dog Night Inc. would adhere to the provisions of the Agreement with American Talent International. Annexed hereto as Exhibit E are copies of the checks sent to William Morris as aforesaid.

7. At the time of making this petition, plaintiff holds approximately $60,000.00, before commission, which defendants and their promoters have requested be sent to defendant William Morris Agency Inc. Annexed hereto as Exhibit F is a letter from one of the aforesaid promoters requesting such a transfer. If plaintiff does so transfer, it loses all control over any funds in New York which could be used to satisfy judgment herein. Plaintiff, there-

fore, would seek to have the attachment herein levied at its own offices at 888 Seventh Avenue, New York, New York and at the offices of defendant William Morris Agency, Inc., 1350 Avenue of the Americas, New York City.

8. To plaintiff's knowledge and belief, the only assets of defendants presently in New York are those funds now held by plaintiff which are to be transferred by check to defendant William Morris Agency.

9. Plaintiff has no recourse to move for this Attachment. All the claimed defendants reside in California, are entertainers constantly on tour throughout the world and are paid directly, to plaintiff's knowledge, wherever they may be performing. Furthermore, upon information and belief, defendant Three Dog Night Inc. has no assets and is simply a flow-through corporation shielding the individual named defendants. The only assets which deponent has been able to locate from which plaintiff might secure at least partial satisfaction of judgment are those moneys held by the New York office of defendant William Morris Agency Inc. This is especially true since defendant William Morris Agency Inc., through defendant's California offices, is collecting additional funds from which plaintiff would be entitled to recover. Therefore, the only course is for the relief prayed for herein.

10. Time is of the essence. By actions of defendants, plaintiff now believes that defendant Three Dog Night Inc. is removing all proceeds and other assets from New York in an attempt to avoid payment to this plaintiff of moneys owed pursuant to the aforesaid agreement as well as damages thereunder. Plaintiff is

entitled to commissions on everything through April, 1973 received by defendants from their date performances pursuant to the aforesaid agency agreement. All funds are being collected and distributed in California or outside of the continental United States.

11. Annexed hereto as Exhibit G is a complete and entire breakdown of how the sum of $50,000.00, which plaintiff seeks to attach herein is computed as prepared by plaintiff's officers, which is a portion of the sum shown in red on Exhibit G.

12. The amount stated herein is due plaintiff, which to deponent's knowledge on information and belief, over and above all counterclaims known to plaintiff at this time.

13. No previous application for this relief has been made to any court or judge.

14. Deponent respectfully requests that the relief sought herein be granted.

/s/ Harley I. Lewin
HARLEY I. LEWIN

Sworn to before me this
20th day of December 1972.

Jack Dashosh

FEDERAL INSURANCE COMPANY

Bond No. 8057-01-34

SUPREME COURT STATE OF NEW YORK
NEW YORK COUNTY SPECIAL TRIAL PART II

AMERICAN TALENT INTERNATIONAL LTD.

Plaintiff

-against-

CORY WELLS, CHARLES M[illegible]KEL, DANIEL HUTTON, MICHAEL ALLSUP, JAMES GREENSPOON, JOE SCHERMIE, FLOYD SNEED, INDIVIDUALLY AND AS THREE DOG NIGHT INC., HURT JACOBS, REB FOSTER ASSOCIATES, WILLIAM MORRIS AGENCY INC.,

Defendants

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UNDERTAKING ON ATTACHMENT

CPLR

Article 62 -Index #25780/72

The above named plaintiff AMERICAN TALENT INTERNATIONAL LTD. having moved (or being about to move) before one of the Justices of this Court for an order of attachment against the property of defendants XXXXXXXXXXXXXX Three Dog Night Inc. under and by virtue of the provisions of Article 62 of the CPLR of the State of New York.

NOW, THEREFORE, the FEDERAL INSURANCE COMPANY, a New Jersey Corporation having an office and place of business at No. 90 John Street, New York 38, New York and authorized to execute undertakings within this State, is firmly bound to the said defendant and to the Sheriff of COUNTY OF NEW YORK respectively, in an aggregate amount, not exceeding the sum of FIVE THOUSAND AND 00/100 ($5,000.00)----------
---------- DOLLARS, under the following terms, conditions and amounts:

1. In the event the plaintiff pays the defendant all legal costs and damages which may be sustained by reason of the attachment, if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, then this obligation is to be void, otherwise to be in full force and effect; and the surety covenants, in that event it shall pay such legal costs and damages, or so much thereof as shall not have been paid by the plaintiff, up to but not exceeding the amount of TWO THOUSAND FIVE HUNDRED AND 00/100 ($2,500.00) -------
---------- DOLLARS, and

2. In the event the plaintiff pays the Sheriff all of his allowable fees then this obligation is to be void, but otherwise to be in full force and effect; and the surety covenants, in that event, it shall pay to the Sheriff such allowable fees, up to but not exceeding the amount of TWO THOUSAND FIVE HUNDRED AND 00/100 ($2,500.00) -------
---------- DOLLARS.

The obligations hereby undertaken are severable and each covenant shall be deemed a separate undertaking as to the defendant herein and as to the Sheriff of COUNTY OF NEW YORK respectively.

Dated: New York, New York December 20, , 19 72 .

FEDERAL INSURANCE COMPANY

By: _____
Assistant Secretary
Margaret Wager

And: _____
Attorney-in-fact
F. C. Duchac

SR 1468
XXXXX

XXXXXXX

NOTARIAL ACKNOWLEDGMENT

CITY, COUNTY & STATE OF NEW YORK, ss:

On this 20th day of Dec. 19 72, before me personally came Margaret Wager and F. C. Duchac to me known, who, being by me duly sworn, did depose and say that they are Assistant Secretary and Attorney-In-Fact respectively of the FEDERAL INSURANCE COMPANY, the corporation described in and which executed the annexed instrument; that they know the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order and authority of the Board of Directors of said corporation, and that they signed their names thereto by like order and authority.

Sworn to and Acknowledged
before me on the date above written

(Notary's Signature, Description and Seal)

CERTIFICATION

CITY AND COUNTY OF NEW YORK: ss

I, the undersigned, Assistant Secretary of the FEDERAL INSURANCE COMPANY, do hereby certify that the following is a true excerpt from the By-Laws of the said Company as adopted by its Board of Directors on March 11, 1953 and amended May 27, 1971 and that this By-Law is in full force and effect.

"ARTICLE XVIII.

Section 2. All bonds, undertakings, contracts and other instruments other than as above for and on behalf of the Company which it is authorized by law or its charter to execute, may and shall be executed in the name and on behalf of the Company either by the Chairman or the Vice Chairman or the President or a Vice-President, jointly with the Secretary or an Assistant Secretary, under their respective designations, except that any one or more officers or attorneys-in-fact designated in any resolution of the Board of Directors or the Executive Committee, or in any power of attorney executed as provided for in Section 3 below, may execute any such bond, undertaking or other obligation as provided in such resolution or power of attorney.

Section 3. All powers of attorney for and on behalf of the Company may and shall be executed in the name and on behalf of the Company, either by the Chairman or the Vice-Chairman or the President or a Vice-President or an Assistant Vice-President, jointly with the Secretary or an Assistant Secretary, under their respective designations."

And I further certify that I have compared the foregoing copy of the POWER OF ATTORNEY with the original thereof and the same is a correct and true copy of the whole of said original Power of Attorney and that said Power of Attorney has not been revoked.

And I further certify that said FEDERAL INSURANCE COMPANY is duly licensed to transact fidelity and surety business in each of the States of the United States of America, District of Columbia, Puerto Rico, and each of the Provinces of Canada with the exception of Prince Edward Island; and is also duly licensed to become sole surety on bonds, undertakings, etc., permitted or required by law.

Given under my hand and seal of said Company at New York, N. Y., this 20th day of December, 19 72

Assistant Secretary

Financial Statement of Federal Insurance Company as of December 31, 1971

IN THOUSANDS OF DOLLARS

STATUTORY BASIS

ASSETS

United States Treasury Bonds	$ 5,268
United States Government Secured New Housing Bonds	40,305
State and Municipal Bonds	128,358
Other Bonds	32,192
Preferred Stocks	12,687
Common Stocks	132,663
TOTAL INVESTMENTS	351,473
Capital Stock of Affiliates:	
Great Northern Insurance Co.	9,326
Pacific Indemnity Company	51,471
Colonial Life Insurance Co. (98%)	14,967
The Chubb Corporation	9,213
Other	620
Cash	3,921
Net Premiums Receivable	24,591
Reinsurance Recoverable on Paid Losses	7,863
Other Assets	15,850
TOTAL ADMITTED ASSETS	$489,295

LIABILITIES AND SURPLUS TO POLICYHOLDERS

Unearned Premiums	$132,563
Outstanding Losses and Claims	122,686
Dividend Payable to Shareholder	4,000
Funds Held under Reinsurance Treaties	9,588
Non-Admitted Reinsurance	5,327
Other Liabilities	23,166
TOTAL LIABILITIES	297,328
Capital Stock	13,987
Paid-In Surplus	9,218
Earned Surplus	75,631
Unrealized Appreciation of Investments	93,131
SURPLUS TO POLICYHOLDERS	191,967
TOTAL	$489,295

Investments are valued in accordance with requirements of the National Association of Insurance Commissioners.
Investments valued at $25,839,000 are deposited with government authorities and trustee as required by law.

Certified Copy of

POWER OF ATTORNEY

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Know all Men by these Presents that the FEDERAL INSURANCE COMPANY, 90 John Street, New York, New York, a New Jersey Corporation, has constituted and appointed Arthur A. Kuhne, Richard D. O'Connor, Liliane S. Dammond, Margaret Wager, Assistant Secretaries of this Company, F. C. Duchac, W. Neal Hamilton and Richard W. Diego who are hereby appointed Attorneys-in-Fact of this Company for the purposes specified in this Power of Attorney, any two of them jointly to have full power to execute under such designations in its name to affix its corporate seal to, and to deliver for and on its behalf, as Surety or otherwise, bonds of either of the following classes, and any instruments amending or altering the same, and consents to the modification or alteration of any instruments referred to in said bonds or obligations, provided that no bond or undertaking executed under this authority shall exceed in amount the sum of Five Hundred Thousand Dollars ($500,000.)

1. Surety Bonds to the United States of America or any agency thereof, including those required or permitted under the laws or regulations relating to Customs or Internal Revenue: License and Permit bonds or other indemnity bonds under the laws, ordinances or regulations of any State, City, Town, Village, Board or other body or organization, public or private; bonds to Transportation Companies, Lost Instrument bonds, Lease bonds, Workmen's Compensation bonds, and bonds on behalf of Notaries Public, Sheriffs, Deputy Sheriffs and similar public officials.
2. Bonds and Undertakings filed in any suit, matter or proceeding in any Court, or filed with any Sheriff or Magistrate, for the doing or not doing of anything specified in such Bond or Undertaking.

In Witness Whereof, the said FEDERAL INSURANCE COMPANY has, pursuant to its By-Laws, caused these presents to be signed by its Assistant Vice President and Assistant Secretary and its corporate seal to be hereto affixed this 1st day of November 19 72.

FEDERAL INSURANCE COMPANY

By

George McClellan
Assistant Vice-President

John MacGregor
Assistant Secretary

FEDERAL INSURANCE COMPANY * NEW JERSEY *

STATE OF NEW YORK }
County of New York } ss.:

On this 1st day of November 1972, before me personally came John MacGregor, to me known and by me known to be Assistant Secretary of the FEDERAL INSURANCE COMPANY, the Corporation described in and which executed the foregoing Power of Attorney and the said John MacGregor being by me duly sworn, did depose and say that he resides in the City of Short Hills, in the State of New Jersey; that he is Assistant Secretary of the FEDERAL INSURANCE COMPANY and knows the corporate seal thereof; that the seal affixed to the foregoing Power of Attorney is such corporate seal and was thereto affixed by authority of the By-Laws of said Company and that he signed said Power of Attorney as Assistant Secretary of said Company by like authority; that he is acquainted with George McClellan and knows him to be Assistant Vice-President of said Company, and that the signature of said George McClellan subscribed to said Power of Attorney is in the genuine handwriting of said George McClellan and was thereto subscribed by authority of said By-Laws and in deponent's presence.

Acknowledged and Sworn to before me
on the date above written

MARY K. BENDICK * NOTARY PUBLIC * STATE OF NEW YORK

Notary Public

MARY K. BENDICK
Notary Public, State of New York
No. 24-0237960
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1973

SEE NOTARIAL ACKNOWLEDGMENT AND CERTIFICATION ON REVERSE SIDE

K-719C (5M)

Form 11363 (Rev. 11-72)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

75A

Index #16516/1973

AFFIDAVIT

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

ARTHUR KASS, being duly sworn, deposes and says:

1. I am the President of plaintiff. I submit this affidavit in opposition to the motion to vacate the Attachment.

2. I will in my affidavit deal with three (3) items. First, the facts concerning defendants' non-residence. Second, the severe financial condition that defendants are in, and third, the construction of the August 24, 1971 agreement. I was present at all of those discussions and was a signatory to many of the agreements signed during that period of time.

3. We had a long and continuing professional relationship with the Schekeryks. Throughout that time, they always lived in New Jersey. I am told that their present New Jersey residence is large and is their living quarters. It has a baby's room for the expected infant, servant's quarters and sits

on a good deal of land. Prior to the time that they owned this house, they owned other residences in New Jersey. Melanie Schekeryk's parents live in New Jersey.

4. I am advised that they file New Jersey State taxes and that their many cars bear New Jersey license plates.

5. The Schekeryk Enterprises office at 200 Central Park South, New York, New York is right near the Gulf and Western office building where Neighborhood Records does business. I have been advised that this small apartment has few of the facilities that their New Jersey address has.

6. During the time that Melanie was under contract with Buddah their various corporate entities maintained an office at 1650 Broadway. To my knowledge, none of those offices had facilities for living.

7. Annexed hereto are photostatic copies of documents that we have over the years been mailing to New Jersey. We have two addresses for the Schekeryks, either their New Jersey address or in care of their New York attorney, Robert Casper. We have never been advised of a change of address.

8. The facts that I know concerning the Schekeryks indicate that they are in financial difficulty. Peter Schekeryk had been calling one of my associates over the past year in an attempt to get us to buy out an interest he has in a co-publishing venture. He told my associate that he needed the money because of financial pressure. Peter Schekeryk and I spoke in September

of this year. Peter indicated that he needed money very badly; that they were under great financial pressure and; that if we had a check for him for his share of the co-publishing venture, he would be by within the hour to pick it up.

9. I believe that the personal income derived by Melanie and Peter Schekeryk from her personal and his business ventures is such that it causes defendants difficulty. I understand that Neighborhood Records, Peter Schekeryk's company, has sustained a series of reverses. Based on documents furnished to me I know that Melanie's last album entitled "Melanie Live at Carnegie" has as of the date of the last accounting sold 20,000 records. Given the advance that they receive, this puts them in a serious red position.

10. I understand that at the time Melanie Schekeryk, through her various corporate entities, entered into an agreement with Famous, she received a commitment for substantial advances to be paid against royalties. I understand that at the present time, and for some period of time prior, royalties were and are far below the advances. In addition, Neighborhood Records, the defendants' recording vehicle, secured certain monies as an advance against record royalties pursuant to their distribution arrangement with Famous. Due to the aforementioned reversals which Neighborhood Records has had with respect to sales of its record product, including Melanie's product, I understand that a substantial deficit position applies to Neighborhood Records as well as Melanie.

I have never seen the financial records relating to Famous or the Schekeryks since they are there. What I have said is the conclusion that I draw on the basis of documents that they have sent to me and on the basis of that illusory concept known as general industry knowledge.

11. As my attorneys have already stated, it was my understanding in the course of the negotiations related to settlement of our disputes with the defendants, that with respect to three of the twenty compositions to be delivered to us, they would be released by Melanie pursuant to her arrangements with other entities.

12. I have been in the publishing business as well as the record business for a considerable period of time. While it is valuable to have a hit artist's name associated with the writing of a particular composition for sale of that composition to other artists, I have never found it essential to have the artist/songwriter record a demonstration version of the composition for sale. More often than not, we use a much less expensive manner and simpler presentation of a composition to aid us in the sale thereof. In addition, no artist I have ever done business with has chosen a composition to record on the basis of the demonstration tape of the composition being recorded by a name artist. Rather, an artist chooses a particular composition because he feels it lends itself to his style. As such, it is simply ludicrous for the defendants to suggest that the $75,000 placed asa valuation on the three (3) compositions was a value determined by Melanie's recording of said compositions

for demonstration purposes. The $75,000 ($25,000 per tune) was arrived at by estimating the potential sales of such tunes as recorded by Melanie, and released for sale to the public, and the publishing income to be derived from such sales. The contention that defendants have made that their obligation is completely satisfied with respect to the agreement of August 24, 1971 by recording demonstration versions is simply untrue. If we were to have such demonstration records made, we would do it ourselves, on the basis of what we felt was the right song for the right artist, not leave it to the whim of an artist with whom we have little or no business dealings.

13. I respectfully request that this Court permit the Order of Attachment to stand.

ARTHUR KASS

Sworn to before me this
1st day of October, 1973.

Notary Public

ANN E. MENDELSON
NOTARY PUBLIC, State of New York
No. 31-2658865
Qualified in New York County
Commission Expires March 30, 1975

Famous Music Corporation
A GULF + WESTERN COMPANY

1 GULF + WESTERN PLAZA
NEW YORK, N.Y. 10023

ROYALTY STATEMENT

80A

BUDDAH RECORDS, INC.
810 SEVENTH AVE.
NEW YORK, N.Y. 10019

DIVISION: PARAMOUNT

Mechanicals	6MO	06-30-73	1
IDENTIFICATION NUMBER	NO. MONTHS COVERED	PERIOD ENDING	PAGE

CATALOGUE NUMBER	GVMT	TUNE NUMBER	TITLE	UNITS	RATE	EXTENDED AMOUNT	AMOUNT PAYABLE
NRS2 049001			Melanie At Carnegie Hall	16,509	.16000	2,641.44	2,641.44
NRS2 049001	M		Melanie At Carnegie Hall	3,859	.16000	617.44	617.44
			TOTAL DOMESTIC ROYALTIES				3,258.88
			TOTAL ROYALTIES DUE				3,258.88

Exhibit A

Check # 16558
9/4

FMC 275-IC 5/70

81A

Rec'd 9/4/73

NUMBER 46548

[illegible]	VENDOR INVOICE NO	INVOICE DATE MO/DAY	REGISTER NUMBER ACCTG. DIV. NO.			NET AMOUNT $
				FOR PRODUCER ROYALTIES PERIOD ENDING 6/30/73	9/4/73	$1,629.44
					TOTAL	$1,629.44

[illegible] RECORDS DIVISION OF [illegible] MUSIC CORPORATION
DETACH STUB BEFORE [illegible] SIGNING CHECK

Famous Music
Corporation
A GULF + WESTERN COMPANY

1 GULF + WESTERN PLAZA
NEW YORK, N.Y. 10023

ROYALTY STATEMENT

DIVISION: PARAMOUNT

BUDDAH RECORES, INC.
810 SEVENTH AVENUE
NEW YORK, N. Y. 10019

Producer	6MO	06-30-73	1
IDENTIFICATION NUMBER	NO. MONTHS COVERED	PERIOD ENDING	PAGE

CATALOGUE NUMBER	GVMT	TUNE NUMBER	TITLE	UNITS	RATE	EXTENDED AMOUNT	AMOUNT PAYABLE
NRS2 049001			Melanie At Carnegie Hall	16,509	.08000	1,320.72	1,320.72
NRS2 049001	M		Melanie At Carnegie Hall	3,859	.08000	308.72	308.72
			TOTAL DOMESTIC ROYALTIES				1,629.44
			TOTAL ROYALTIES DUE				1,629.44

82A

Ck # 46541

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

83A

Index No. 16516/73

STATE OF NEW YORK.)
) ss.:
COUNTY OF NEW YORK)

MARLENE H. LINDER, being duly sworn, deposes and says:

On October 1, 1973, I went to 200 Central Park South, the alleged address for Melanie Schekeryk and to the Gulf & Western Building. At the Gulf & Western Building there is no listing for Melanie Schekeryk. There is a listing for Peter Schekeryk, Schekeryk Enterprises and for Neighborhood Records. When I went to the Gulf & Western Building and asked whether or not I could serve papers on the Schekeryks I was told that they did not know where the Schekeryks were. They were surprised that I had come to this address seeking the Schekeryks because one of them stated that they were very rarely there. At the 200 Central Park South address I spoke to someone in the A. Schekeryk office. He advised me that the Schekeryks were both in New Jersey and that Peter Schekeryk would not be returning to New York for another two weeks. I was advised by one of the Schekeryks' representatives that the Schekeryks were taking natural child birth courses in New Jersey.

Marlene H. Linder
MARLENE H. LINDER

Sworn to before me this
1st day of October, 1973

Ann E. Mendelson

ANN E. MENDELSON
NOTARY PUBLIC, State of New York
No. 31-2658865
Qualified in New York County
Commission Expires March 30, 1975

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

84A

Index #16516/73

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

AFFIDAVIT

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

JOSEPH E. ZYNCZAK, being duly sworn, deposes and says:

1. During August of 1971, I was House Counsel to Buddah Records, Inc. and its related companies, including Kama-Rippa Music, Inc. During such employment, I prepared the letter agreement dated August 24, 1971, between Melanie Schekeryk, Peter Schekeryk, Melanie Music and Kama-Rippa Music, Inc.

2. The last paragraph on Page 1-A of the agreement dated August 24, 1971, represented an understanding arrived at by the parties thereto that Melanie Schekeryk would record three compositions of the twenty that were to be delivered by her in satisfaction of her obligations under a co-publishing agreement that the parties had previously entered into in May of 1968. The parties contemplated that the three compositions were to be included on a Melanie album other than the initial album Melanie was to deliver to Paramount Records. Melanie Schekeryk and Peter Schekeryk advised Kama-Rippa Music that pursuant to the recording agreement

existing between Melanie Schekeryk, Peter Schekeryk and their appropriate corporation, that the right to select material to be recorded was within their control. The parties further agreed to insure the recording of at least three of the compositions contained in the 20 to be delivered by Melanie that she would pay to Kama-Rippa Music the sum of $25,000 per each composition she failed to record for inclusion in an album to be released and distributed by Paramount Records. The $25,000 amount represented an approximization of earnings Kama-Rippa Music would enjoy as a result of the recording and release of a musical composition in one of Melanie's long playing albums.

3. The word record as used in the agreement is used as it is normally used in the recording industry. It reflects the understanding of the parties that Melanie would record the composition in the same manner as she customarily records a composition to wit; in a professional recording studio, accompanied by professional studio musicians, performing a fully embellished arrangement of each composition, at a cost of several thousands of dollars for each composition embodied in a master recording, and cause the release thereof for sale to the public. This is why the term was used relating to the three (3) compositions and the special treatment they were to be given.

4. The foregoing treatment of the three (3) compositions was selected as a method of reimbursing Kama-Rippa Music for not being able to collect on future songs recorded by Melanie for

Buddah, since she would no longer be recording for Buddah.

Joseph E Zynczak

JOSEPH E. ZYNCZAK

Sworn to before me this

5th day of October, 1973.

Richard A. Abrams

Notary Public

RICHARD A. ABRAMS
Notary Public, State of New York
No. 24-0007504
Qualified in New York County
Commission Expires March 30, 1975

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

KAMA RIPPA MUSIC, INC.,

Plaintiff,

87A

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Index #16516/73

AFFIDAVIT OF ATTEMPTED SERVICE

Defendants.

----------x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Marguerite A. Stenson, being duly sworn, deposes and says:

On October 5, 1973 I attempted to serve the defendants Melanie and Peter Schekeryk at 200 Central Park South and at the Gulf and Western Building. When I arrived at 200 Central Park South the doorman directed me to Apartment 6B. I rang the doorbell several times but there was no response from within. The desk clerk then told me that the Schekeryks were not in and he had no idea when they would be. At the Gulf and Western Building, I noted the following listings on the building directory: Schekeryk Enterprises, Ltd., Schekeryk P., Neighborhood Records.

I was directed by a young lady at Famous Music Corp. on the same floor as the Schekeryk businesses, to a small unmarked office. When I asked where Schekeryk Enterprises ltd., was located I was told in that office that Peter Schekeryk was not there, had not been there for well over four months and was not expected at any time in the near future. I was also told that his present whereabouts were not known.

Marguerite A. Stenson

Sworn to before me
this 8th day of October, 1973.

Harold I. LEWIN
Notary Public, State of New York
No. 31-2531463
Qualified in New York County
Commission Expires March 30, 1974

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- -x

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

- -x

– 89A

REPLY AFFIDAVIT

Index No. 16516/73

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

SANDOR FRANKEL, being duly sworn, deposes and says:

1. I am counsel for the defendants in the above-captioned matter. I respectfully submit this reply affidavit in response to the affidavits of plaintiff's counsel which opposed defendants' instant motion for an order to vacate the Order of Attachment and levies thereunder in this matter, and following oral argument before the Hon. Jacob Markowitz in Special Term, Part I, on October 9, 1973.

2. This reply affidavit will address plaintiff's contentions in the order in which the issues relevant to this motion were raised and discussed in deponent's moving affidavit.

I. PLAINTIFF IS GUILTY OF BAD FAITH IN OBTAINING THE ORDER OF ATTACHMENT

3. Plaintiff's counsel contended in oral argument before this Court on October 9, 1973 that the failure of plaintiff to advise the issuing Judge in Special Term, Part II, of the pending federal action was not done in bad faith, but was justified because the federal action had not yet commenced. This contention is factually erroneous. On August 31, 1973, plaintiff filed its complaint in the United States District Court for the Southern District of New York. Rule 3 of the Federal Rules of Civil Procedure expressly provides as follows:

> "A civil action is commenced by filing a complaint with the court."

Thus, on September 17, 1973, when plaintiff submitted its ex parte application for an Order of Attachment and failed to advise this Court of the federal proceedings, the federal action had already been commenced. Moreover, on September 10, 1973, ten days after commencement of the federal action and a week prior to plaintiff's application for an Order of Attachment, deponent personally received a telephone call and spoke with a United States Marshal attempting to serve the defendants at their New Jersey home with the Complaint in the federal action. Melanie, at the time, was nearly nine months pregnant (she delivered on October 3, 1973), and was with her husband, defendant Peter Schekeryk, away from that home. I personally advised the Marshal, on September 10, that I was authorized to and did accept service on their behalf;

a copy of the Marshal's record of service attesting to the above is annexed hereto as Exhibit 1. Thus, despite the contention during oral argument of plaintiff's counsel, the federal action had been commenced seventeen days before plaintiff's application for the Order of Attachment, and deponent had informed the Marshal of my immediate availability for service seven days before plaintiff's application; yet plaintiff deliberately concealed the pending federal action from Judge Waltemade in Special Term, Part II.

II. THIS COURT DOES NOT HAVE JURISDICTION OF THIS ACTION

4. For the reasons stated above and in the corresponding section of deponent's moving affidavit, it is respectfully submitted that plaintiff's bad faith in deliberately concealing from the issuing Court the pendency of other proceedings between these parties warrants, without more, granting of the instant motion. Moreover, as a matter of substantive law, because of the pending federal action this Court is and was without jurisdiction to issue the Order of Attachment and, alternatively, as a matter of comity between state and federal courts, this Court should decline to exercise such jurisdiction (and should therefore vacate and set aside the Order of Attachment and levies thereunder).

5. In addition to the authorities cited in deponent's moving affidavit, numerous other New York cases support de-

fendants' contention.

6. In Berzin v. Litton Industries, Inc., 29 App.Div.2d 857, 288 N.Y.S.2d 552 (1st Dept. 1968), defendants appealed from an order denying their motion for summary judgment and a stay of proceedings; the Appellate Division unanimously reversed on the grounds that "such an action, involving substantially the same issues as are now tendered in the [State-court] pleading, is now pending in the U. S. District Court, Southern District of New York."

7. In Channel Master Corp. v. JFD Electronics Corp., 26 App.Div.2d 961, 275 N.Y.S.2d 1019 (3d Dept. 1966), the Appellate Division unanimously modified the judgment of the court below by ordering a stay of all proceedings pending the outcome of a federal court action previously commenced between the same parties and involving the same issues. See also Marco v. National Airlines, Inc. et al., 34 Misc2d 577 (Sup.Ct. 1962); Wanek v. Richardson-Merrell, Inc., 243 N.Y.S.2d 759, 40 Misc2d 635 (Sup.Ct. 1963); Krisel v. Phillips Petroleum Co., 32 App.Div.2d 628, 299 N.Y.S.2d 895 (1st Dept. 1969).

8. Plaintiff cites two cases which it claims warrant this Court's exercising jurisdiction (see plaintiff's memorandum of law, p. 6); defendants respectfully submit that both cases are entirely different and distinguishable from the instant case for the following reasons. In Kaplan v.

Anita Eshay Fair Sex Jewels, Inc., 137 N.Y.S.2d 43 (Sup.Ct. 1954), defendant cross-moved for dismissal of the state action on the ground of pendency of a federal action; in rejecting defendant's claim, the court relied on the fact that "the federal action is not between the same parties."* 137 N.Y.S.2d at 45. In the instant case, of course, both the federal and purported state actions are between the identical parties. Plaintiff also relies on Jacobson v. New York Racing Ass'n., 328 N.Y.S.2d 785 (Sup.Ct. 1972); however, in Jacobson the state court exercised jurisdiction on the express ground that in the state complaint a material "allegation is nowhere contained in the federal action and, as plaintiff points out, there is no possibility that a judgment in the federal case will dispose of the issues raised herein." 328 N.Y.S.2d at 787. Such is not true in the instant case: precisely the same issues between the same parties are raised in both the federal and state complaints, and a judgment in the federal case will completely dispose of the issues raised in the state case.

9. The affidavit of plaintiff's counsel claims that plaintiff "has now transferred its action to state court", and that plaintiff now intends to dismiss the federal com-

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* The court also noted that the defendant could not so cross-move because the other action was pending in federal and not state court; however, this distinction was expressly removed after the decision in this case by the enactment of CPLR 3211(4).

plaint, and annexes an "Affidavit of Attempted Service" of the purported state-court complaint. Suffice it to say that no such transfer has been effected or even attempted, no papers in support of such an attempt have been served on defendants or deponent, the federal action has been assigned and is now pending for all purposes before the Hon. Whitman Knapp, and any attempt by plaintiff to dismiss that action and bring the same action in state court will be vigorously opposed by defendants in both federal and state courts. With respect to the "Affidavit of Attempted Service," it is noteworthy that said service was not attempted until October 5, 1973--following receipt by plaintiff's counsel of deponent's affidavit in support of defendants' motion to vacate the Order of Attachment and levies, wherein deponent noted, in attempting to show this Court that the purported state court complaint was a mere sham used to obtain an Order of Attachment which would have been unobtainable in the federal court, that plaintiff had made no attempt to serve defendants. It is also noteworthy that plaintiff made no attempt to call deponent to have deponent accept service on defendants' behalf--which deponent has done in the past, as is known to plaintiff's counsel. Moreover, defendants personally are and have been completely available for service of process.

III. PLAINTIFF IS GUILTY OF ABUSE OF THIS COURT'S PROCESSES IN OBTAINING THE ORDER OF ATTACHMENT 95A

10. As noted in deponent's moving affidavit, the real purpose underlying plaintiff's attempt to levy upon property held by plaintiff itself is plaintiff's attempt to avoid the automatic reversion to Melanie of copyrights to her songs, a reversion that would result from plaintiff's failure to remit to Melanie within the time contractually required a full royalty payment for the half-year ending June 30.

11. Plaintiff attempts to justify a levy against itself by annexing to its opposing papers a previous Order of Attachment obtained in a different matter. Deponent respectfully submits that the propriety or impropriety of that Order of Attachment in a different case completely unrelated to this one is utterly irrelevant to the issues now before this Court.

12. Moreover, plaintiff attempts to show that the improper purpose alleged in deponent's moving affidavit is untrue, by claiming (1) that plaintiff never received a demand for royalty payments from Melanie personally, and (2) that in any event plaintiff has in good faith attempted to pay Melanie the royalties due her. Both claims, for the following reasons, are without merit.

13. The claim that Melanie has not demanded royalty payments is frivolous. Plaintiff has for many previous years made royalty payments to Melanie by sending her checks

to the American Guild of Authors and Composers (hereinafter "AGAC"), an association duly authorized to act as agent for collection of royalties owed to Melanie and numerous other performers. AGAC has recently concluded an audit of plaintiff's books on Melanie's behalf, with, of course, plaintiff's full knowledge and consent. AGAC formally demanded payment from plaintiff on Melanie's behalf by registered letter delivered August 24, 1973 (a copy is annexed to defendants' moving papers as Exhibit H); plaintiff has never before questioned the propriety of that demand in the one and one-half months that have since elapsed.

14. Plaintiff's counsel claims that AGAC never responded to plaintiff's demand for AGAC's signed authorization to collect royalties on Melanie's behalf. In fact, that request was made by plaintiff's counsel after many years of plaintiff's dealing with AGAC as Melanie's agent for collection and making numerous payments to AGAC on Melanie's behalf, and only after commencement of the federal action. AGAC referred plaintiff's request to deponent, and on September 13, 1973 deponent wrote to plaintiff's counsel requesting the reason for his sudden request for a copy of AGAC's contract with Melanie (in that letter, deponent also repeated previous demands made on Melanie's behalf for payment of royalties). A copy of deponent's letter is annexed hereto as Exhibit 2; plaintiff's counsel never responded to said letter.

15. Plaintiff's further claim that it has made a good-faith attempt to pay Melanie her royalties, and that Melanie

has refused to accept said payment, is not only false, but starkly illustrates plaintiff's bad-faith attempt to abuse this Court's processes in obtaining the Order of Attachment and levies. On September 20, 1973, a messenger brought to AGAC's offices (1) a statement showing royalties due to Melanie of $79,436, (2) a check for $4,436, and (3) a copy of the Order of Attachment (which is in the sum of $75,000). Obviously, plaintiff was attempting to put itself in the position where it could argue in the federal action for reversion of copyrights--a counterclaim which plaintiff had already been advised would shortly be filed in the federal action--that a bona fide tender of royalties had been made by plaintiff to Melanie; that is, plaintiff seeks through the processes of this Court to be in a position to argue in federal court that plaintiff was legally estopped--by virtue of its self-imposed Order of Attachment--from paying Melanie full royalties. Of course, Melanie would not accept partial payment of $4,436 when $79,436 was in fact conceded by plaintiff to be owing (in fact, defendants believe that far in excess of the conceded amount is owing), and AGAC, acting on Melanie's behalf, refused said tender of partial payment (a copy of AGAC's letter of refusal to plaintiff is annexed hereto as Exhibit 3). Plaintiff similarly attempted to tender a small partial payment to defendant general counsel, Robert Casper, Esq. (upon whom levy under the Order of Attachment had also been made), which was similarly refused for the same reasons.

16. Thus, as predicted in deponent's moving affidavit, plaintiff has already begun attempting to construct an artificial defense to Melanie's prospective copyright-reversion claim, by tendering a miniscule portion of royalties due, accompanied by a copy of the levy which plaintiff caused to be served upon itself. This attempt to construct a defense is not a legitimate reason for the issuance of an Order of Attachment. It is respectfully submitted that the extreme remedy of an Order of Attachment, issued ex parte and before resolution of the underlying litigation, should be invoked only in those rare instances where it is realistically urgent, required, and necessary. The funds of Melanie which plaintiff caused to be levied upon are funds of Melanie held by plaintiff itself. If plaintiff is justified in not paying full royalties to Melanie (and we respectfully submit that plaintiff is not so justified), then plaintiff need only refuse to pay Melanie and bear the legal consequences, if any, in the copyright-reversion action; certainly, an Order of Attachment is not necessary or appropriate under these circumstances.

IV. DEFENDANTS' VALID CLAIMS AGAINST PLAINTIFF PRECLUDE THE GRANTING OF AN ORDER OF ATTACHMENT

17. Plaintiff claims that defendants' claims against plaintiff do not bar the issuance of an Order of Attachment because plaintiff is not "willing to concede as just" defendants' pending $2,000,000 counterclaims now pending in this

Court in the original 1971 litigation (see plaintiff's memorandum of law, pp. 4-5).

18. However, plaintiff fails completely to address the fact that plaintiff's conceded debt to Melanie of approximately $80,000 bars the issuance of an Order of Attachment. "[W]hether proof of claim was filed or not, a valid offset against the plaintiff's claim would be a counterclaim within the scope of [the predecessor statute to CPLR 6212(a)]." Rothstein v. Autourist A/S, 37 Misc.2d 683, 236 N.Y.S.2d 337, 340 (Sup.Ct. 1963). Plaintiff has conceded that defendants have a valid claim against plaintiff for $80,000, an amount in excess of the amount specified in the Order of Attachment (which is in the amount of $75,000). As noted in deponent's moving affidavit (¶26 thereof), in order for plaintiff to have validly obtained an Order of Attachment in the sum of $75,000, plaintiff's claim against defendants would, under CPLR 6212(a), have had to exceed its acknowledged debt to defendants by $75,000. To the contrary, plaintiff concedes that it owes to defendants $5,000 over and above the $75,000 specified in the Order of Attachment. For that reason alone, and without consideration of plaintiff's failure to advise the issuing Court of the pendency of $2,000,000 in counterclaims asserted in the 1971 litigation, the Order of Attachment should be vacated.

V. NO GROUNDS FOR AN ORDER OF ATTACHMENT EXIST UNDER CPLR §6201 - 100A

19. The opposing affidavit of plaintiff's counsel, in claiming that Melanie and Peter Schekeryk are not residents of New York, relies on the fact that in defendants' answer in the original 1971 litigation between these parties, the defendants admitted being residents of New Jersey. This is irrelevant for several reasons. In the first place, although one may have only one domicile, one may have more than one residence, and an Order of Attachment is only permissible where a defendant is both a non-domiciliary and non-resident (see authorities cited in deponent's moving affidavit, ¶¶ 28-34); these are fundamental principles which plaintiff's opposing papers neither contest nor address but, rather, ignore.

20. Moreover, plaintiff attempts to support its position by reference to its pre-1971 dealings with the defendants, claiming that "the residence situation with the Schekeryks is the same today as it was in 1971" (see opposing affidavit of Martin Garbus, ¶9). This is totally inaccurate, as reflected in the fact that since that time the defendants have actually resided at 200 Central Park South pursuant to the two-and-one-half-year lease executed on March 6, 1972 (and annexed as an exhibit to Exhibit I of deponent's moving affidavit); furthermore, since 1971 the defendants regularly conduct business at 1 Gulf & Western Plaza, in a multi-office suite furnished to them under multi-year contracts with

Famous Music Corp. (a subsidiary of Gulf & Western Industries Inc.). Plaintiff's moving papers claim that the defendants do not actually do business at this latter address. Deponent represents to this Court, based upon deponent's personal knowledge and as an officer of this Court, that this allegation is untrue, and that deponent has personally met numerous times with these defendants at that office, and has had telephone conversations with them there, in connection with this and several other matters in which deponent represents them. Neither the address at 200 Central Park South nor that at 1 Gulf & Western Plaza is a facade (indeed, at $11,880 per annum, their residence at 200 Central Park South would be an expensive facade). In short, defendants, despite their home in New Jersey, are residents of New York; they are, have been, and will be available for service of process; their assets are, have been, and will be available if plaintiff recovers any judgment (which, we respectfully submit, will not occur); and, notwithstanding plaintiff's unsupported allegations, the defendants are completely solvent and responsible, financially and otherwise.

21. The one case cited by plaintiff in support of its position, Strater v. Strater, 20 App.Div. 2d 889 (1964) (miscited in plaintiff's memorandum of law as 20 A.D.2d 1964), is clearly inapposite. In Strater, the Court sustained an Order of Attachment for the reason that "it very clearly appears that, in 1961, [the defendant] deliberately abandoned

any residence he may have had in New York City and established York Harbor, Maine, as his sole place of abode." 20 App.Div.2d at 890. As the facts recited in deponent's moving affidavit and in this affidavit show, this is not true in these defendants' case; rather, they fall within the doctrine of Loew's, Inc. v. Dorsey, and Zenatello v. Pons, cited and discussed in deponent's moving affidavit, ¶¶ 33-34.

22. Plaintiff's counsel's affidavit attempts to support plaintiff's claim that the defendants are not residents of New York by predicting that defendants intend to dispute diversity jurisdiction in the federal action. This is untrue, and plaintiff has no grounds for making the assertion. Diversity of citizenship for purposes of determining jurisdiction of federal courts depends upon state citizenship, not residence (see Wright, Federal Courts, pp. 74-75 (1963)); plaintiff's federal complaint alleges that the defendants are citizens of New Jersey for federal jurisdictional purposes, and the defendants do not deny that. However, for purposes of determining the appropriateness of an Order of Attachment under CPLR 6201, residence, rather than citizenship, governs. In any event, plaintiff chose the federal court as the forum in this action, and until such time as the federal court may decline jurisdiction, the Order of Attachment should be vacated. See Wanek v. Richardson-Merrell, Inc., 40 Misc.2d 635, 243 N.Y.S.2d 759 (Sup.Ct. 1963).

VI. PLAINTIFF'S COMPLAINT IS, PRIMA FACIE, LEGALLY INSUFFICIENT TO SUPPPORT AN ORDER OF ATTACHMENT

- 103A

23. Plaintiff's opposing papers contend that plaintiff's complaint is not prima facie insufficient to support an Order of Attachment, notwithstanding the fact that Melanie's alleged obligation to release for public distribution the three recorded songs is nowhere reflected in the Agreement Regarding Remaining Songwriting Obligations which forms the basis for plaintiff's action.

24. Annexed hereto as Exhibit 4 is an affidavit of Robert Casper, Esq., the attorney who represented Melanie and Peter Schekeryk in the discussions leading up to and culminating in the Agreement Regarding Remaining Songwriting Obligations; Mr. Casper describes the complete absence of any agreement to release the musical compositions, and the fact that "record" (the word used in the agreement) and "release" (the word not used in the agreement) have separate and distinct meanings and convey separate and distinct obligations. Deponent will not burden the Court with a repetition of Mr. Casper's affidavit, but respectfully refers the Court to it.

25. Deponent only wishes to note the following: As plaintiff's papers concede, Kama Rippa Music, Inc. is a publishing company; its affiliate, Buddah Records, Inc., is a record company. The Agreement Regarding Remaining Songwriting Obligations is between these defendants and Kama Rippa Music, Inc., not Buddah Records, Inc. (a fact confused in the

opposing affidavit of Martin Garbus, Esq., wherein at ¶9 he states, "Buddah Records, Inc. has complied in every way with the August 24, 1971 Agreement"--in fact, Buddah Records, Inc. is not even a signatory to that agreement); the agreement itself begins, "Reference is hereby made to our Co-Publishing Agreement of May 31, 1968 and our exclusive Songwriters Agreement of May 31, 1968." It is beyond question that the Agreement created no obligation to release any recorded performances, for plaintiff's record affiliate, Buddah Records, Inc., had just signed a contract with Famous Music Corp. (a subsidiary of Gulf & Western Industries, Inc.) pursuant to which Buddah received $500,000 for all rights to Melanie as a recording artist.

VII. THE EX PARTE ORDER OF ATTACHMENT WAS OBTAINED BY PLAINTIFF'S RECOURSE TO UNCONSTITUTIONAL MEANS

26. Defendants respectfully submit on this argument for the reasons stated in deponent's moving affidavit.

27. Plaintiff contends, in its opposing affidavit and in its memorandum of law, that if this Court finds "procedural defects" in the Order of Attachment, plaintiff should be given an opportunity to correct those defects. Defendants respectfully submit that the defects in the Order of Attachment are substantial and not mere technical or procedural defects, and that the Order of Attachment and levies there-

under should be in all respects vacated and set aside with prejudice.

WHEREFORE, and for the reasons stated in deponent's moving affidavit, it is respectfully submitted that the instant motion should be granted in its entirety.

Sworn to before me this
10th day of October, 1973.

GUDRUN W. HANSEN
Notary Public, State of New York
No. 15-6702183
Qualified in Richmond County
Commission Expires March 30, 1974

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

PLAINTIFF: KAMA RIPPA MUSIC, INC.
COURT NUMBER: 73 Civ 3757
DEFENDANT: MS. MELANIE SCHERYK, et ano., etc.
TYPE OF WRIT: Complaint

SERVE: NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC. TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN
PETER SCHERYK
AT: ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)
20 Rimwood Drive, Lyncroft, New Jersey 07738

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:
EMIL, KOBRIN, KLEIN & GARBUS
540 Madison Avenue
New York, New York 10022

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc. NO. 1 OF 2

CHECK IF APPLICABLE:
☐ One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

$6.36 P Cheque remit

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR | TELEPHONE NUMBER (212) 826-6[illegible] | DATE 8/31/73

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (or applicable fee) and sign USM-285 for first writ only if more than one writ submitted. | DEPOSIT/CODE | DIST. OF ORIGIN | DISTRICT TO SERVE | LOCATION OF SUB-OFFICE OF DIST. TO SERVE

I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown. | SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK | DATE 9/4/73

☐ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above) | ☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode.

ADDRESS (Complete only if different than shown above)

DATE(S) OF ENDEAVOR (Use Remarks if necessary) 9/10/73 | DATE OF SERVICE 9-20-73 | TIME 11:[illegible] AM PM | SIGNATURE OF U. S. MARSHAL OR DEPUTY | FEE (If applicable) $ 3.00 | MILEAGE $ –

REMARKS:

Endv 9/10/73 - 90 miles : $10.80 - To one home but caretaker - info he did not know where Scherykes were but stated their attorney Landon Frankel in N.Y. who stated that he would accept service - was also authorized but did not know their whereabouts. Attorney Landon Frankel's address is 225 Broadway, N.Y. N.Y. Please serve there! A. Zapolin

D13

PRIOR EDITIONS MAY BE USED | 3. NOTICE OF SERVICE

September 13, 1973

Martin Garbus, Esq.
Emil, Kobrin, Klein & Garbus
540 Madison Avenue
New York, N. Y. 10022

Dear Mr. Garbus:

I am writing to you on behalf of my clients, Melanie and Peter Schekeryk.

Peter Thall, Esq. has forwarded to me your letter to him of August 30, 1973. Mr. Lewis Bachman has forwarded to me your letters to him of August 29, 1973 and August 30, 1973.

In the above mentioned letters, you have proposed, on behalf of your clients, placing into an escrow account funds owed by your clients to Melanie. Please be informed that your suggestion is unacceptable to my clients.

Appropriate demand has previously been made for payment of royalties due to my clients, and I reiterate that demand on their behalf.

In your letter of August 30, 1973 to Mr. Bachman, you have also requested a copy of AGAC's contract with Melanie. Would you please inform me of the reason for this request.

Yours truly,

SF/gh

/s/ Sandor Frankel

American Guild of Authors and Composers

108A

Lewis M. Bachman
EXECUTIVE DIRECTOR

September 20, 1973

Kama Rippa Music, Inc.
Kama Sutra Music, Inc.
810 Seventh Avenue
New York, New York
10019

Gentlemen:

A messenger brought to our office this afternoon a check for $4,436 and statement showing royalties due of $79,436.

On Melanie's behalf, we do not accept partial payment of royalties due and owing to her.

We hereby reiterate all demands previously made for full payment of all royalties due and owing to Melanie. Pursuant to written demand made upon you by letter dated August 23, 1973 delivered by Registered Mail on August 24th, 1973 and your contractual obligations to Melanie, if full and complete payment of all royalties payable to Melanie is not made by September 24th, 1973 all rights in and to Melanie's compositions revert automatically to her.

Very truly yours,

Lewis M. Bachman

LMB/ck

BY HAND

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

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Index No. 16516/73

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE TO VACATE ORDER OF ATTACHMENT AND LEVIES THEREUNDER

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT L. CASPER being duly sworn, deposes and says:

1. I am a member of the firm of Casper & Thall, P. C., General Counsel for defendants, Ms. Melanie Schekeryk, Mr. Peter Schekeryk, individually and d/b/a Amelanie Music. I submit this Affidavit in support of the motion to vacate the Order of Attachment and Levies thereunder.

2. I am an attorney licensed to practice in the State of New York and have practiced law and, particularly, general entertainment and music law, in the City of New York for more than fifteen (15) years. During this time, I have represented hundreds of clients, including hundreds of songwriters, recording artists and music publishing companies; among which, have been and are included many of the most commercially and artistically successful musical artists/publishing and recording companies in the world.

3. Prior to August 24, 1971, I, on behalf of the defendants, participated in the discussions with plaintiff, resulting in the preparation and execution of the letter agreement regarding Melanie Schekeryk's remaining songwriting obligations referred to in such agreement, dated August 24, 1971. During the

course of these discussions which were reflected in the agreement which was executed (and which was drafted by plaintiff's counsel, Joseph E. Zynczak, Esq.), there was never any contemplation of the release of the recordings frequently referred to in said agreement.

4. In my experience in the entertainment industry, and particularly, the publishing and recording industry, the words "record" and "release" have two (2) entirely separate meanings. The differences between such words are often the cause of extended, protracted and sometimes even heated negotiations. The word "record" has always been intended to mean, in my experience, and without exception, the actual production onto tape of a sound recording containing the performance of one (1) or more individual vocalists and/or instrumentalists. The word "release" has always been intended to mean, in my experience, and without exception, the general distribution into commerce of phonograph records derived from the master sound recordings to which I have just referred.

5. In the context of music publishing, the word "record" is used to mean the recording of a performance of either the writer or studio musicians for purposes of producing a demonstration tape, which is then duplicated by the music publisher and presented to recording artists, record companies and producers with a view toward causing the musical composition (which is the only asset acquired by the music publisher) to be subsequently recorded. It is through this process that music publishers gain exploitation of their compositions.

6. Accordingly, the reason that the plaintiff sought to have Melanie record three (3) of the twenty (20) compositions was to obtain a particularly valuable demonstration tape containing the performance of a major international songwriter and recording artist, the receipt of which by other recording artists, record companies and producers would not only be appreciated and valued but would receive their specific attention, particularly when one considers that major recording artists, recording companies and producers receive hundreds of such demonstration tapes containing the performances of studio musicians of musical compositions authored by unknown writers over the years. It would have been very easy for the plaintiff's own counsel, or the plaintiff's principals, to propose, and conceivably to demand that the word "record" used in the said agreement be changed to "release". However, a mere reading of the August 24, 1971 agreement shows that the parties contemplated and agreed upon the mere "recording" and not "release" of the three (3) musical compositions. The word "release" or any such similar phrase denoting distribution to the general record buying public, nowhere appears in the agreement.

ROBERT L. CASPER

Sworn to before me this
10th day of October, 1973.

Notary Public

PETER M. THALL
Notary Public, State of New York
No. 31-9310645
Qualified in New York County
Commission Expires March 30, 1974

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

112A

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

Index No. 16516/73

AFFIDAVIT IN RESPONSE TO REPLY AFFIDAVIT OF SANDOR FRANKEL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HARLEY I. LEWIN, being duly sworn, deposes and says:

1. I am associated with Emil, Kobrin, Klein & Garbus, attorneys for the plaintiff in the above captioned matter. I respectfully submit this response affidavit in reply to the affidavit of defendants' counsel, all in the matter of the instant motion for an order to vacate the order of attachment and levies thereunder and following oral argument before Hon. Jacob Markowitz in Special Term, Part I, on October 9, 1973.

2. This affidavit will address defendants' contentions in the order in which the issues relevant to this motion have been raised and discussed heretofore.

I. PLAINTIFF HAS ACTED IN ALL GOOD FAITH IN OBTAINING THE ORDER OF ATTACHMENT

3. Defendants' counsel argues that your deponent in oral argument advised the Court that failure to advise the Court of a pending federal action is justified because the federal action had not yet commenced. Nothing could be further from the truth. Deponent had advised the Court and reiterates herein

that plaintiff made an alternative decision to seek redress in the State courts because it felt it was a more proper form and, that in view of the fact that the summons and complaint, while filed (it is a matter of office policy to file a summons and complaint almost routinely when considering serving defendants in a federal action) the summons and complaint in such federal action had not been served at the time of commencement of the State action. As the affidavit of Martin Garbus, Esq. hereto annexed shows, the Marshal was, in fact, in error in serving the defendants herein. At the time of securing the Order of Attachment we had advised the Marshal not to effect service because we had decided to withdraw our federal action in view of the fact that a State action was being commenced. In fact, proceedings are underway at this time, to attempt to withdraw such summons and complaint from federal court.

4. The judgment by this office was made in all good faith and, in view of the decision not to proceed with the federal action, we in fact did not consider such federal action relevant to the state of facts surrounding the application for an Order of Attachment. As such, we attempted to make a prima facie case sufficient to secure such order and, the issuing Judge in Special Term, Part II, evidently agreed that such a prima facie case had been made and that the requirements of CPLR 6201 et seq had been met. It is noteworthy at this time to note that service of the summons and complaint in the federal action took place against this office's express authority and, further, that no answer or other papers have been submitted by defendants in such federal action. It seems obvious that issue has not been joined and that defendants have no intention of doing so.

5. Service of the federal action took place over a week after the State action had been commenced. In view of the foregoing facts this office did not, in all nonesty, feel that such an action is relevant to the facts surrounding the matter at hand. It is exceedingly doubtful, in view of outstanding case law that the pendency of such an action is relevant to the grant of a provisional remedy in State court. This is particularly true in view of the fact that issue had not been joined and no other papers beside the summons and complaint had been issued.

II. THIS COURT CLEARLY HAS JURISDICTION OF THIS ACTION

6. Frankel, defendants' counsel, in section 2, paragraphs 4, 5, 6, 7, 8 and 9 argues most vociferously on a vague basis, and without substance, that this Court is without jurisdiction to issue a provisional remedy by virtue of the summons and complaint having been filed in the federal action. This argument is without merit.

7. Frankel cites Berzin v. Litton Industries, Inc., 29 App. Div.2d 857, 288 N.Y.S.2d 552 (1st Dept. 1968) and Channel Master Corp. v. JFD Electronics Corp.,26 App. Div.2d 1961, 275 N.Y.S.2d 1019 (3rd Dept. 1966) in support of his contention. Neither one of these two cases is relevant to the issue at hand. It is salient to note that in both cases the Court retained jurisdiction, imposed a stay on certain proceedings in the State court by virtue of the federal proceedings having been clearly underway, i.e., issue has been joined, Answers submitted and various other papers submitted in the pending federal action. In addition, there was no prejudice to any parties by staying the State court action while the federal court action had continued, considering that the federal court action was already well under-

way. In our case the federal court action is in no way underway, particularly in view of the fact that we intend to withdraw our summons and complaint. In addition, the factual situation in Berzin, supra, was such that plaintiffs'amended pleading submitted in State court did not make out a material individual cause of action. As such, the court has no recourse but to dismiss the pending action in State court since federal action was already underway.

8. In Channel Master Corp., supra, the holding of the court is opposite to the contentions made by Frankel in his paragraphs regarding jurisdiction of this court in the within action. The court in Channel Master, responding to defendant's argument that the matter in the State court should be dismissed since the same case had been previously commenced in federal court, refused to determine that question and further refused to dismiss the action pursuant to defendant's motion. The action was stayed (the court implied because of a complexity of issues which had already been undertaken in federal court, i.e., patent licensing and the like) and, more importantly, did not vacate the interim injunction which had been issued by a lower State court in the matter. The final holding of the court was that the matter would be stayed and that the injunction issued would stand. Clearly then, applied to this court the attachment should stand even though this court may choose to stay the pending action. We, of course, argue that no such stay should be issued.

9. Frankel also cites a number of other cases including Wanek v. Richardson-Merrell, Inc., 243 N.Y.S.2d 759, 40 Misc.2d 635 (Sub. Ct. 1963) in support of his contentions. The court in Wanek again refused to dismiss the action but merely stayed the action on the basis that there was a motion then pending in federal court by the defendants with respect to jurisdiction. The

court made no finding along the lines that Frankel is suggesting and in fact refused to do so.

10. In Kaplan v. Anita Eschay Fair Sex Jewels, 137 N.Y.S.2d 43 (Sup. Ct. 1954) while the court did state that one of the reasons it was rejecting defendant's claim for dismissal was because the action was not between the same parties, the court went on to say with respect to such motion to dismiss that "such defense lies only with respect to another action pending in the courts of this state and does not apply to another action in the federal courts" at page 45. We would submit as Frankel has once again attempted to deliberately mislead this court continues to follow such a course of action as will be pointed out later herein.

11. Some comments are in order in response to the matters raised in Frankel's affidavit, paragraph 9 therein. The affidavits heretofore submitted to this court regarding attempted service on the defendants were made expressly to show that the defendants are not and have not been available for service. Frankel's self-serving statement, without proof or back-up information that the defendants have always been available for service is patently false. As has heretofore been shown this court, defendants reside in New Jersey, are rarely in New York, are notorious for ducking service of process. Ultimately, as the affidavit of Marguerite A. Stenson hereto annexed illustrates, service has been effected against Peter Schekeryk by traveling to New Jersey and finding him at his New Jersey residence and domicile. This has been done not only to effect service as would normally be done, but also to show to this court that the only way defendants could be served is at their New Jersey home and residence and not, as Frankel would

have this court believe, in any other place.

III. PLAINTIFF HAS OBTAINED THE ORDER OF ATTACHMENT PURSUANT TO THIS COURT'S PROCESS AND WITHOUT ABUSING SAME

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12. As deponent reads Frankel's reply affidavit with respect to this contention Frankel argues that (a) plaintiff levied on itself incorrectly, (b) that plaintiff is attempting to avoid the automatic reversion to Melanie of copyrights of her songs, (c) that AGAC by making formal demand on behalf of Melanie established a time limit for plaintiff to act, (d) that tender of partial payment by plaintiff was illustrative of plaintiff's bad faith and that, for the foregoing reasons, plaintiff abused this court's process in obtaining the Order of Attachment. These arguments are ridiculous.

13. Defendants' counsel has offered no law with respect to the impropriety of a plaintiff levying upon itself. There is a very simple reason that plaintiff caused the attachment to be levied at its offices. The reason for this, as is clear in all papers heretofore submitted, is that these are the only assets which plaintiff has been able to locate in the City of New York directly due defendants. Defendants are not making money. Defendants' record companies are not making money. Defendants are in a red position with their overall distributor Famous Music Corp. Defendants are notorious for unwisely spending their funds. The only money due defendants which could be levied upon were the monies then held by plaintiff to be delivered to Robert L. Casper, P.C. (the attachment was also levied there) and the AGAC (the attachment was not levied there because plaintiff does not recognize their authority). Assuming we were to seek an attachment of defendants' funds against others besides ourselves, we would have attached thin air. No jurisdiction

would have been secured by virtue of no assets having been secured under the levy. The purpose of the attachment was to secure jurisdiction over the defendants because they are New Jersey residents and domiciliaries and, further, to preserve those assets which might ultimately be used to satisfy plaintiff's judgment which will clearly be forthcoming on the merits of this case. Deponent can categorically state that no other motive was behind the securance of the Order of Attachment.

14. Defendants have not demanded royalty payments. Plaintiff has paid the AGAC as a courtesy to defendants in prior years. The AGAC has no jurisdiction in this case as plaintiff is not a signatory thereto. Plaintiff had agreed with Robert L. Casper, P.C. to pay certain monies to Casper, then Casper turns around and issues a self-serving letter, subsequent to the oral agreement with plaintiffs, to let plaintiff pay defendants at some other address. Plaintiff attempted to make part payment. Defendants refused such part payment. Defendants have continued to refuse such part payment. If plaintiffs had paid over all assets in spite of the Order of Attachment plaintiff would have been in contempt of court and its application for the Order of Attachment would have been a falsehood. Plaintiff attempted to pay the sum in excess of the Order of Attachment to defendants. Defendants refused to accept. As far as can be determined the AGAC has not heretofore made written demand upon plaintiff for payments on behalf of defendants and that the AGAC's demand herein was as a result of a dispute over payment on the Settlement Agreement. This dispute has not heretofore arisen and, therefore, plaintiff has not had occasion to dispute the authority of the AGAC.

15. The statement contained in Frankel's letter of September 13, 1973, and in his affidavits regarding said letter, are completely self-serving. If we are to observe any demand it would be a demand of Frankel, not the AGAC. It is interesting to note that despite the request, most recently made, for the support of the authority of the AGAC to demand actions on plaintiff's part for defendants, that is, a copy of the agreement between defendants and the AGAC, has never been responded to. Frankel's affidavit states that this was the first time such a demand had been made. This is true, precisely because we had questioned the AGAC's authority to make such a demand. No one, to date hereof, has come forward with a copy of any document evidencing the authority of the AGAC to act on behalf of Melanie Schekeryk in her dealings with plaintiff herein. Until such a time as the authority for such demand is shown and proven to plaintiff, plaintiff is fully justified refusing to recognize such alleged authority. Perhaps a reason that a copy of such contract is not forthcoming is because AGAC does not have such authority and the contract would reveal same.

16. Your deponent has not yet been able to fathom the reason why partial tender of royalties due was not accepted by Melanie's alleged agents. No one has claimed that acceptance of such payment would be a waiver of any of Melanie's claims for the balance of royalties. We have in fact, agreed that such royalties are due and owing and clearly stated that the only reason they were being withheld is because an Order of Attachment had been levied against them. The Order of Attachment had been levied against them at plaintiff's insistence because this is the only way that plaintiffs could (a) secure jurisdiction and (b) preserve at least some assets for judgment in plaintiff's favor. Frankel's statement regarding partial payment is simply self-serving and do not bear on the issue at hand. An Order of

Attachment is issued, as noted in Frankel's affidavit, paragraph 16 thereof, when such an order is urgent, required, and necessary. Clearly, the Order of Attachment was required. The defendants are New Jersey residents and domiciliaries and transferred their assets outside the jurisdiction of this court. In rem jurisdiction was the only alternative open to plaintiff, plaintiff is under an absolute obligation to seek to protect those assets of defendants which might ultimately be used to satisfy a judgment in favor of plaintiff. Order of Attachment was required, was urgent in view of the fact that plaintiff was about to disburse certain funds to defendants' alleged agents (which, of course, turn out not to be their agents) these assets were basically the only assets which plaintiff had knowledge of which was within this court's jurisdiction. This is particularly true in view of the severe down turn of Melanie's recording career and Peter's basically red position in his businesses. The affidavit of Arthur Kass, President of plaintiff, heretofore submitted, clearly shows that defendants were desperate for money and continue to be desperate for money. As such, it was more than probable that the assets both held by plaintiff when transferred to defendants' agents would be moved forthwith from without this court's jurisdiction. Attachment was clearly necessary. Plaintiff was left without choice of remedy for all of the reasons cited herein and in the papers heretofore submitted and really had no choice but to move forward and ask this court for a provisional remedy. The final statement of Frankel, entwining plaintiff's cause of action herein with royalty payments due as a result of other publishing is ludicrous. Plaintiff need not be in a position to expose itself to a risk of a loss of near half a million dollars on the basis of an $80,000 claim. This is untenable. In addition, it is quite obvious, that Frankel is

himself attempting to create a "catch 22" position in that he argues that defendants are New York residents and if this is true plaintiff would lose jurisdiction in federal court, since jurisdiction was based on diversity. In other words, Frankel would have plaintiff proceed on an $80,000 claim, which would probably be thrown out of federal court if Frankel is correct. The two elements are not entwined as Frankel would have us to believe. It is clear from the papers heretofore submitted and will not be further discussed herein.

IV. THE ARGUMENT RAISED BY DEFENDANTS REGARDING EXISTING COUNTERCLAIMS IS FALSE AND A BLANTANT ATTEMPT TO MISLEAD THIS COURT

17. Frankel is attempting to mislead this court, as he has often accused plaintiff's counsel of doing, in raising the issue of existing counterclaims citing Rothstein v. Autourist A/S, 37 Misc.2d 683, 236 N.Y.S.2d 337, 340 (Sup. Ct. 1963). Plaintiff concedes defendants have the existing counterclaim upon which Frankel seems to be harping. It equally concedes that plaintiff has a debt owing to defendants in the neighborhood of $80,000. Frankel would have this court believe that we did not inform the court, in Special Term, Part II, of the issues relevant to the Order of Attachment. Nothing could be further from the truth.

18. We have heretofore argued, particularly in our Memorandum of Law, that the cases hold that the only counterclaims which plaintiff need mention are those counterclaims which plaintiff believes constitute a just and worthy claim by defendants. Plaintiff clearly spelled out for the issuing court circumstances surrounding monies due defendants from plaintiff, namely the $80,000 publishing royalties. This, plaintiff has conceded is due and owing to defendants and, ultimately plaintiff will pay out at least part of this money to defendants. Plaintiff's

claim is unrelated to this sum. Plaintiff intended to pay the excess beyond the amount attached, in all good faith, to defendants' agents. Defendants' alleged agents refused to accept even part payment of such sum.

19. Frankel attempts to cloud the waters and mislead this Court with regard to the counterclaims preserved in a former action by settlement. Plaintiff stated in open court and reiterates herein that such counterclaims are without merit, were raised solely for the purpose of harassing the plaintiff in the former action who had a just and meritorious claim. The settlement payment of nearly $500,000 was witness the validity of plaintiff's claim in the former action. No action in over two years has been taken by defendants with respect to their existing counterclaims. The only time such counterclaims were raised were the original answering papers without evidenciary support or any other proof as to the merit of such claims and, in fact, such counterclaims have no merit whatsoever.

20. However, assuming arguendo defendants' claims are meritorious (which they are not) plaintiff stated to this court during oral argument and reiterates herein that plaintiff, in said former action, preserved a certain cause of action which cause of action amounts to over three million dollars and is obviously in excess of both amount of money owing defendants by way of publishing royalties and defendants' counterclaims, in the aggregate. Plaintiff has clearly disclosed this, particularly with reference to the publishing royalties due defendants and further stated that plaintiff's claim was above all claims known to it which could possibly be made by defendants. This is obviously the truth. In this regard it is salient to note that Frankel, in his continuing attempt to misstate the facts, nowhere in his reply affidavit mentions the three million dollar existing cause of action which plaintiff has against defendants.

The facts speak for themselves and require no such further discussion.

V. CLEAR GROUNDS EXIST FOR ATTACHMENT UNDER CPLR 6201(1) 123A

21. The issue raised by Frankel herein is another blatant attempt to mislead this court. Frankel hangs his argument on residence on two things, (1) a lease which is in an obvious corporate name and (2) his own self-serving statements as to the defendants' residence. While Frankel could have annexed innumerable documents as proof of residence he chose only to annex a copy of a corporate lease. Plaintiff's papers heretofore submitted clearly show that the defendants are domiciled and reside in New Jersey. As the court well knows, as was stated in oral argument, one determines residence and domicile by the true state of facts; by the reality of a situation, not the mere self-serving statements of an attorney.

22. The assertion that defendants have residence by the corporate office maintained in New York City is ludicrous. People do not live and reside at 1 Gulf & Western Plaza. By the admissions of the employees of defendants neither one of the defendants shows up at such offices for any extended period of time and, in particular, Melanie only comes in perhaps once or twice a year.

23. Frankel attempts to persuade this court that because defendants pay high rental for an office on Central Park South it should be considered a residence. This is silly. Defendants are well known for squandering their assets concerning matters of status. Witness the fact that, despite Melanie's down turn as a recording artist and Peter's red position with respect to his various affairs, defendants own two homes in New Jersey, maintain a staff of servants, drive a Mercedes Benz and Rolls Royce and have all the accoutrements of permanent

domicile and residence. Any other contention is ludicrous and simply will not stand.

VI. PLAINTIFF HAS MADE A PRIMA FACIE CASE SUFFICIENT TO SUPPORT AN ORDER OF ATTACHMENT

24. Plaintiff has heretofore recited the full course of events and facts surrounding the instant dispute. Plaintiff's initial affidavit applying for the Order of Attachment clearly stated disputes surrounding the obligations of both parties under the agreement of August 24, 1971. Plaintiff delinated how the dispute arose, what the present status of the dispute was and the probable resolution of such dispute in plaintiff's favor. Additional papers submitted by all parties hereto, other than the self-serving affidavit of Casper confirm plaintiff's contention. Defendant has offered no proof to the contrary.

25. Defendants' counsel is attempting to try the merits of the case in the confines of his motion to vacate. His attempt is without merit. There is a clear question of fact and plaintiff has an undebatable cause of action regarding that question. The merits of plaintiff's claim are clear. It is salient to note that Frankel basically reiterates in his section the arguments he previously raised and again, omitted to mention the penalty clause and the reasons therefor. The reasons are obvious and need not be discussed herein. Frankel is attempting to deal with the elements of this case in a fishbowl outside the overall settlement made between the parties and the obligations flowing therefrom. Plaintiff has clearly spelled out these obligations and made a meritorious claim. Plaintiff is not obligated to try its claim in its application but has shown this court the merits and facts. This issue need not be further discussed.

VII. PLAINTIFF'S ACTION IN STATE COURT SHOULD BE MAINTAINED AND THE ORDER OF ATTACHMENT SHOULD NOT BE VACATED

26. Defendants' counsel has gone to great lengths to construct an elaborate defense based on the mere service of a summons and complaint in federal court and service of such papers on defendants subsequent to the commencement of the action herein. In essence, defendants' counsel has missed the entire rationale behind the desire of courts to avoid the duel actions. Initially, it is to be noted that Rule 3211(a) 4. of the CPLR of New York while developing grounds for a motion to dismiss by virtue of a cause of action pending in a court of the State and of the United States the rule goes on the say "the court need not dismiss upon this ground but may make such order an justice requires." The essesence of the facts herein show that plaintiffs have acted openly and clearly stated their case and would be severely prejudiced by any dismissal or vacating the attachment.

27. The rationale underlying prohibition against maintenance of two separate actions between the same parties and for the same cause is to spare the parties the unnecessary labor and expense of conducting two controversies over the same matter. Axyex Corp. v. Sanchez, 169 N.Y.S.2d 864, 9 Misc.2d 481 (New York Sup. 1958). Defendants have not been put to any expense with respect to the federal action. Plaintiff has stated that it intends to move to dismiss the federal action. Plaintiff has stated that it instructed the Marshals not to serve the federal papers. Issue has not been joined. Appearances have not been made and expense has not been incurred in the federal action. Quite the contrary herein. There have been two court appearances, numerous hours have been put in by counsel for both sides at great expense to their clients in the within action and the court is now fully knowledgeable and apprised of all facts surrounding said cause. To cause a vacating of the Order

of Attachment and/or a dismissal of the within cause of action on a procedural ground, where the court has discretion not to do so, would in this case cause enormous duplication of effort in the federal courts and would, as will be shown below, act not to prejudice defendants but to severely prejudice the plaintiffs.

28. In addition, the courts have held, for long periods of time, that the technical defenses in abatement on the ground of another action pending are not favored where prejudice has not resulted. Panzeca, Inc. v. Board of Education, 323 N.Y.S.2d 978, 29 N.Y.2d 508 (Ct. App. N.Y., 1971). This is precisely the instant case. Defendants applied for an order to show cause on an incorrectly stated set of facts and were granted such order to show cause. Nowhere, on close examination of defendants' papers, in either the papers submitted in support of the order to show cause or in any of the papers including the reply affidavit of Sandor Frankel, submitted to this court on the instant motion, do defendants make a showing that they have been prejudiced or in any way put to any discomfort or inconvenience by virtue of the Order of Attachment. Deponent finds it difficult to understand why an order to show cause was granted initially since defendants had made no showing of such prejudice warranting the accelerated procedure brought to bear under such order to show cause. Defendants have argued, without merit, certain defenses regarding their motion to vacate. They have made no showing whatsoever of prejudice or harm to themselves by virtue of the Order of Attachment. The within case has gone well beyond the mere service of a summons and complaint. The federal case has not. If any action were to be abated under the proper policies and theories surrounding the rules of abatement, it would be the federal action, not the State.

29. As a general rule the court is required to look at both actions to see whether or not full relief may be obtained in either action as an element in determining whether or not one of the two actions may be dismissed. Eastwood v. Premis, 189 N.Y.S.2d 454, 9 A.D. 2d 553 (N.Y. A.D. 1959). Where one party cannot in the first proceeding obtain relief to which it is entitled, the pendency thereof is no bar to a second proceeding for the same relief. People Ex Rel. Hayes v. Pope, 247 N.Y.S. 393, 231 App. Div. 279 (N.Y. A.D. 1931). The court must consider whether or not the plaintiff's rights are to be protected as well as the defendants, particularly when entertaining a motion to dismiss because of pendency of another action. Deponent would argue most strongly that plaintiffs would be unable to secure the same relief in federal court by virtue of the attachment being granted herein. Should the court dismiss the within action or vacate the Order of Attachment plaintiff would then be under a clear obligation to cause the transfer of the levied assets now being held by plaintiff to defendants' alleged agents. As has heretofore been shown the history of the dealings between the parties combined with the foreign residents and domicile of defendants and their desperate need for money would cause an immediate transfer of all assets which might go to secure judgment on this matter outside the jurisdiction of this court. Plaintiff, therefore, would in no way be able to secure adequate relief by then continuing a federal action or renewing a State action for that matter after the federal action was dismissed.

30. Although the court is given power under CPLR 3211(a)4 to dismiss or stay the State court action because of the pendency of a federal action the courts in general have been loathe to do so. See Izquierdo v. Cities Serivce Oil Co.(PA), 264 N.Y.S.2d 58, 47 Misc.2d 1087, (N.Y. Supp. 1965), Ackert v.

v. Ausman, 218 N.Y.S.2d 814, 29 Misc.2d 974 (N.Y. Supp. 1961) and this is especially true when the two actions are in federal and State court as opposed to two State courts. The foregoing taken into account to the already great expense put in by all parties in the State court matter and the almost lack of expense put in in the federal court matter must require this court to exercise its discretion in such a matter as to cause the continuance of both the Order of Attachment and the proceedings herein.

31. Plaintiff should not be able to run the lopsided risk, as defendant's counsel contents it must, to risk the loss of the half million dollars worth of copyrights by virtue of what amounts to a comparatively smaller claim. This is particularly true in view of the misrepresentations and other falsehoods put forth by defendant's counsel's papers continuously throughout this action.

32. It is now clear after receipt of defendant's reply papers that the original papers submitted by defendants on the order to show cause were false and were known by defendants to be false. They were false with respect to the accusations about residents and they were false with respect to the accusation about plaintiff's attempt to mislead the court by failing to state a substantial counterclaim. Defendants with full knowledge of the fact that plaintiff had a substantial claim in the former law suit failed to advise Judge Waltemade when they sought the original Order to Show Cause to vacate. Defendants with full knowledge of the facts that nothing had been done in the prior case for thirty months failed to advise the court of the status of that case. Any objective reading of defendants statement of facts concerning the counterclaim charges indicate that the defendants deliberately withheld information from the court.

33. Defendants were similarly dishonest in their analysis of the issue of residents. Defendants, who,of course, have better knowledge than either plaintiff or the court, of

defendants' residence, fail to submit income tax returns, motor vehicle application forms, telephone numbers, leases and the like. Plaintiff, in order to get the facts that it did about residence, had to engage in basically a one week dragnet, reflected in papers heretofore submitted, including attempts at finding the defendants in New York and a corporate service to do research in New Jersey.

34. After one is through reading the pages of affidavits submitted by defendants' attorney, one finds the defendant left only with the allegation that plaintiff attempted to take advantage of defendants and mislead this court because plaintiff's attorney did not make mention of the federal action. Nothing could be further from the truth.

35. As the affidavits and papers heretofore submitted show, the federal action was filed on August 31, 1973. At the time that we had filed the attachment in this action, some three weeks later, the Marshal had been unable to serve the Schekeryks and had informed us of same. The Schekeryks are entertainers who travel. We were extremely concerned about our jurisdiction and about the defendants becoming judgment proof. We also, from knowing defendants, had anticipated that they would go into federal court and argue that the federal court did not have jurisdiction because of plaintiff's business contacts with New York. We attempted before and after the federal action was filed to determine whether Amelanie Music was a New York entity or not. We found no records in any jurisdiction to substantiate a jurisdictional claim.

36. As heretofore been recited during early September we were faced with additional problems by virtue of the fact that defendants had shifting representatives. At first it was Mr. Casper, then Mr. Thall, then Mr. Casper, then the AGAC, now we are told it is Sandor Frankel. The shifting representation problem had been carried on throughout the year, we believe

that they were using it as an attempt to cover up and avoid service of process and in order to avoid our valid claims.

37. In the event this court feels we ought to have notified the judge in Special Term Part II about the federal action we point out that there is no claim of prejudice made by defendants and secondly that the penalty for vacating this attachment against the plaintiff would be incredibly severe as against the plaintiff. We would be forced into a position of seeking an additional attachment, be required to pay attorneys' fees, but most importantly, then become involved in a totally new and separate piece of litigation with the defendants over the rights to a publishing venture. Defendants have not in any manner been prejudiced. They wanted to obtain the funds, they could have easily done so by posting a bond. They have not done so. They have not answered the federal action.

38 Plaintiffs have made every attempt to deal openly and honestly with defendants. We began communications with them at the end of August 1973 when they attempted to deliver to us a totally unsatisfactory demonstration tape (which is the essence of the issues herein), and maintained that that sufficed as to their obligations under the agreements which we maintain require them to release certain songs. We communicated with the defendants up until the date we sought the attachment. We tried to work out a variety of alternative means with respect to the funds under the attachment so that there would be no need for same. Defendants were advised we needed security for the funds we subsequently attached as we felt we had a valid claim and knew the history of defendants squandering their funds. Attorneys in this office suggested that those funds be placed in an escrow account. Instead of openness and honesty, we were met with evasion and misrepresentation and shifting representatives. In addition many of our letters suggesting alternate

methods of resolving the dispute herein left unanswered, papers which we attempted to deliver to certain of the defendant's attorneys were not accepted.

39. In view of all of the foregoing and in view of the merits of the claim herein plaintiff would respectfully submit that the attachment herein be upheld and that this action be permitted to continue.

Respectfully submitted,

Harley J. Lewin, Esq.

Sworn to before me this
11th day of October, 1973

Marlene H. Linder

MARLENE H. LINDER
Notary Public, State of New York
No. 31-4557602
Qualified in New York County
Certificate Filed in Kings County
Commission Expires March 30, 19 74

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

132A

KAMA RIPPA MUSIC, INC.,

Index #16516/72

Plaintiff,

AFFIDAVIT

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individiually and d/b/a AMELANIE MUSIC,

Defendants.

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

MARTIN GARBUS, Esq., being duly sworn, deposes and says:

1. Immediately after the attachment was obtained in this case, I contacted the Marshall's office in order to tell them not to effect service. I never reached the Marshall who was involved in this particular service. I believed that at the time that the attachment in this case was filed, that service had not been effected in the Federal Court.

2. As the receipt from the Marshall's office indicates, he was unable to serve either of the Schekeryks. Mr. Frankel has not, to date, in the Federal action filed any documents indicating he is filing an answer in that law suit. I did not know about the Marshall's conversation with Mr. Frankel until after the motion to vacate the attachment had been made.

MARTIN GARBUS

Sworn to before me this
10th day of October, 1973.

Lynn E. Mendelson

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

133A

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

Index #16516/73

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

MARGUERITE A.STENSON, being duly sworn, deposes and says:

1. I reside at 338 East 83rd Street, New York, New York 10028, am over the age of eighteen years, and am not a party to this action.

2. On the 9th day of October, 1973, I served the within Summons and Complaint on the defendant, Peter Schekeryk, by delivering a true and complete copy thereof to him personally at his residence at 20 Rimwood Drive, Lincroft, New Jersey. I knew the person so served to be the person mentioned and described in said papers as the defendant therein.

Marguerite A. Stenson
MARGUERITE A. STENSON

Sworn to before me this
11th day of October, 1973.

Ann E. Mendelson
Notary Public

ANN E. MENDELSON
NOTARY PUBLIC, State of New York
No. 31-2658865
Qualified in New York County
Commission Expires March 30, 1975

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

KAMA RIPPA MUSIC, INC.,

Plaintiff,

- against -

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

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INDEX NO. 16516/73

Special Term Part I N. Y. LAW JOURNAL
TO CTY. C.R. Recd. from Justice DISPTN BOOK

MARKOWITZ, J.:

Defendants move to vacate the order of attachment in this action granted ex parte on September 13, 1973. The court need not pass upon all aspects of the defendants' multifaceted attack upon the order of attachment since, in its ex parte application, plaintiff failed to submit evidentiary proof of its causes of action beyond the $75,000 claimed in plaintiff's first cause of action, and that amount is less than the approximately $80,000 admittedly owed to the defendants by the plaintiff.

CPLR 6212(a) provides:

> "On a motion for an order of attachment the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action and the one or more grounds for attachment provided in section 6203 [sic. 6201] that exist and the amount demanded from the defendant above all counterclaims known to the plaintiff."

As noted by Weinstein, Korn & Miller, New York Civil Practice, section 6212.05:

> "The effect of insisting upon a statement by the plaintiff of the amount by which his claim exceeds any counterclaims is to permit the court to limit the attachment of defendant's property to the amount that is necessary to provide security for plaintiff's demand and thereby avoid tying up any of the defendant's property in excess of that amount."

Since the plaintiff limited its evidentiary

presentation to its claim of $75,000, and since the plaintiff admittedly owes defendants approximately $80,000, there was no legal foundation for the order of attachment.

While the complaint sets forth two additional causes of action, each in the amount of $500,000, the damages alleged in these additional causes of action are totally unsubstantiated and speculative. Hence they do not constitute a proper basis for granting an order of attachment (Weinstein, Korn & Miller, supra., sections 6212.04 and 6223.11). Accordingly, defendants' motion to vacate the September 17, 1973 order of attachment is granted.

Settle order.

Dated: November 7, 1973

J. S. C.

United States District Court JUDGE KNAPP

FOR THE
SOUTHERN DISTRICT

– 136A

CIVIL ACTION FILE NO.

73 Civ. 3789

KAMA RIPPA MUSIC, INC.,

Plaintiff

v.

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a MELANIE MUSIC,

Defendants

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon

EMIL, KOBRIN, KLEIN & GARBUS, Esqs.

plaintiff's attorney, whose address is 540 Madison Avenue, New York, New York 10022

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ Raymond F. Burghardt
Clerk of Court.

/s/ B. Edwards
Deputy Clerk.

Date: New York, New York
August 31, 1973

[Seal of Court]

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

137A

KAMA RIPPA MUSIC, INC.,

73 Civ. 3789

Plaintiff,

-against-

COMPLAINT

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

KAMA RIPPA MUSIC, INC., by its attorneys, Emil, Kobrin, Klein & Garbus, complaining of defendants herein alleges:

AS AND FOR A FIRST CAUSE OF ACTION

FIRST: The amount in controversy in this law suit exceeds the sum of $10,000. It is based on diversity of citizenship.

SECOND: Plaintiff, KAMA RIPPA MUSIC, INC. (hereinafter "KR Music"), is a corporation organized and existing under the laws of the State of New York, having offices at 1650 Broadway, New York, New York, and is principally engaged in the business of music publishing.

THIRD: Defendants are residents of the State of New Jersey and do business therein as entertainer, producer, artist manager and song writer.

FOURTH: Defendant AMELANIE MUSIC is, on information and belief, the assumed name under which defendants Melanie Schekeryk and Peter Schekeryk jointly conduct their music publishing business.

FIFTH: On information and belief, Defendant Amelanie Music owns, controls, administers and otherwise does business in the musical compositions written by defendant Melanie Schekeryk.

SIXTH: On or about May 31, 1968 plaintiff and defendants entered into a Co-Publishing Agreement, whereby defendants and plaintiff agreed to co-publish certain compositions written by defendant Melanie Schekeryk.

SEVENTH: On or about May 31, 1968 plaintiff and defendants entered into an Exclusive Songwriters Agreement whereby defendant Melanie Schekeryk agreed to furnish exclusive songwriter's services to plaintiff KR Music and defendant Amelanie Music, jointly.

EIGHTH: On or about August 24, 1971, in complete settlement of the obligations of the aforesaid Co-Publishing Agreement and Exclusive Songwriters Agreement, both as amended, and further, as partial settlement of then ongoing litigation between the parties hereto, plaintiff and defendants agreed that certain compositions wholly written by defendant Melanie

Schekeryk would be delivered to plaintiff for publishing and that, within two (2) years of August 24, 1971, defendant Melanie Schekeryk would record and release three (3) of those compositions delivered pursuant to said settlement agreement.

NINTH: On or about the 27th day of June, 1973, Peter M. Thall, Esq., attorney for defendants, advised plaintiff KR Music that, of those compositions then delivered to plaintiff KR Music for publishing pursuant to the aforesaid settlement agreement, defendant Melanie Schekeryk had recorded three compositions, namely: "I Almost Forgot," "Moonbeam" and "Let Him See Your Smile" in partial satisfaction of her obligations pursuant to said settlement agreement.

TENTH: On or about the 12th day of July, 1973, in response to a prior inquiry of plaintiff's counsel, said Peter M. Thall, Esq. advised plaintiff's counsel that defendants saw no obligation to release the aforesaid three (3) recorded compositions.

ELEVENTH: As of the date of this complaint, defendants have not released for public sale and distribution any one of said three (3) recorded compositions and, on information and belief, do not intend to release any of such compositions prior to the expiration of the two year period provided for in said settlement agreement.

TWELFTH: Paragraph "6" of said settlement agreement

provides that if such three (3) recordings are not made and released then defendants would pay to plaintiff the sum of $25,000 per composition or a total of $75,000 as liquidated damages.

THIRTEENTH: Plaintiff is entitled to liquidated damages of $75,000 by reason of the failure of defendants to record and release the aforesaid three (3) compositions.

AS AND FOR A SECOND
CAUSE OF ACTION

FOURTEENTH: Plaintiff repeats and realleges each and every allegation contained in paragraphs "FIRST" through "ELEVENTH" of this Complaint as if fully recited herein.

FIFTEENTH: By reason of their refusal to record and release said three (3) compositions defendants have breached and violated their settlement agreement with plaintiff of August 24, 1971.

SIXTEENTH: By reason of the foregoing facts plaintiff has been damaged in the amount of $ 500,000.

AS AND FOR A THIRD
CAUSE OF ACTION

SEVENTEENTH: Plaintiff repeats and realleges each and every allegation contained in paragraphs "FIRST" through "ELEVENTH" of this Complaint as if fully recited herein.

EIGHTEENTH: At the time of entering into said settlement agreement defendants were fully aware that plaintiff would

TWENTY-FOURTH: Plaintiff has no adequate remedy at law.

WHEREFORE Plaintiff prays for the following relief:

1. Judgment on the First Cause of Action against the Defendants, jointly and individually, in the amount of $75,000 together with costs and disbursements of this action.

2. Judgment on the Second Cause of Action against the defendants, jointly and individually, in the amount [illegible] together with the costs and disbursements of this action.

3. Judgment on the Third Cause of Action against the defendants, jointly and individually, in the amount of $500,000, together with the costs and disbursements of this action.

4. Declaratory judgment on the Fourth Cause of Action, pursuant to the Federal Rules of Civil Procedure, declaring the rights and other legal relations of the parties in respect to the matters set forth in the Complaint, and that said Declaratory Judgment specify the following:

A. Whether the defendants have satisfied the settlement agreement of August 24, 1971 by merely recording said three (3) compositions and subsequently refusing to release them for sale; and

B. That the plaintiff have such other different and further relief and declaration of the rights and legal relations of the parties to this action as to the Court may seem proper and necessary.

Yours, etc.,

EMIL, KOBRIN, KLEIN & GARBUS

BY: /s/ Marten Garbus
A Member of the Firm
Attorneys for Plaintiff
Office and P. O. Address
540 Madison Avenue
New York, New York 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC., Plaintiff, -against- MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC, Defendants. --and-- MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC, Counterclaimants, -against- KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC., Counterdefendants.	NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT IN FAVOR OF MELANIE SCHEKERYK ON THE SECOND, THIRD AND FIFTH COUNTERCLAIMS AGAINST KAMA RIPPA MUSIC, INC. 73 Civ. 3789

- 142A

S I R S:

PLEASE TAKE NOTICE that upon the affidavit of Sandor Frankel, sworn to the 19th day of December, 1973, upon the accompanying memorandum of law, upon the Answer and Counterclaims of the defendants/counterclaimants, and upon all prior proceedings and pleadings heretofore had between the parties, defendant/counterclaimant Melanie Schekeryk will cross-move before the Hon. Whitman Knapp on the 21st day of December, 1973, at 2:30 o'clock in the afternoon of that day,

or as soon thereafter as counsel may be heard, for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, in favor of Melanie Schekeryk and against plaintiff/counterdefendant Kama Rippa Music, Inc., on the second, third and fifth counterclaims asserted by Melanie Schekeryk against Kama Rippa Music, Inc., on the grounds that there are no triable issues of fact and that there is no defense to said counterclaims, as a matter of law, together with costs and disbursements, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
December 19, 1973

Yours, etc.,

/s/

SANDOR FRANKEL
Attorney for Defendants/Counterclaimants
225 Broadway
New York, New York 10007
(212) 227-6000

TO:

EMIL, KOBRIN, KLEIN & GARBUS, ESQS.
Attorneys for Plaintiff/Counterdefendants
Kama Rippa Music, Inc., Kama Sutra Music, Inc. and Buddah Records, Inc.
540 Madison Avenue
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

--and--

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

- -x

144A

AFFIDAVIT IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

73 Civ. 3789

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

SANDOR FRANKEL, being duly sworn, deposes and says:

1. I am counsel for the defendants/counterclaimants herein and respectfully submit this affidavit in support of the motion for partial summary judgment on the second, third, and fifth counterclaims asserted by Melanie Schekeryk (hereinafter "Melanie", the name she uses professionally) against

plaintiff Kama Rippa Music, Inc. (hereinafter "Kama Rippa"). A copy of defendants' Answer and Counterclaims is annexed hereto as Exhibit 1; Melanie's second, third, and fifth counterclaims appear at pages 9-10, and 23-26 thereof.

2. Melanie is a professional singer, songwriter, recording artist, and entertainer. The counterclaims involved in this cross-motion arise out of a songwriting contract between Melanie and Kama Rippa, and a second contract clarifying the obligations of the first.

3. On or about May 31, 1968, a written agreement was entered into between Melanie, on the one hand, and Kama Rippa and Amelanie Music* (jointly referred to in said agreement as "Publisher"), on the other hand; said agreement is hereinafter referred to as the "Songwriter's Agreement". A copy of said Songwriter's Agreement is annexed hereto as Exhibit 2.

4. In and by said Songwriter's Agreement, it was provided and agreed that Melanie would deliver to Kama Rippa musical compositions composed by Melanie during the term of the agreement, and that Kama Rippa would remit royalty payments semi-annually to Melanie during the full 28-year life of the copyrights. From and after the date of the Songwriter's

---

* Amelanie Music is a publishing company jointly owned by defendants Melanie and Peter Schekeryk, through which they publish musical compositions. A companion co-publishing agreement between Kama Rippa and Amelanie Music is described in deponent's affidavit in opposition to Kama Rippa's motion to dismiss, at p. 3, footnote.

Agreement, Melanie did deliver said musical compositions as required by the contract.

5. The Songwriter's Agreement provides that Kama Rippa will deliver to Melanie

> "on or about each August 15th covering the six (6) months ending June 30th . . . royalty statements showing the amount of compensation due to [Melanie], accompanied by remittance for any royalties shown to be due [Melanie] by said statement." (See §6 of Songwriter's Agreement).

A rider to this paragraph provides that:

> "The payment of royalties when due are of the essence. Accordingly, if publisher fails to account and pay royalties in accordance with this paragraph and such failure and default continues following thirty (30) days written notice of such failure and default, this agreement shall terminate and all rights in and to the compositions theretofore covered shall revert to [Melanie]. This provision may be specifically enforced." (See rider to §6 of Songwriter's Agreement.)

4

6. In 1971, disagreements between the parties resulted in litigation, which was substantially settled in May, 1971. On or about August 24, 1971, Kama Rippa entered into a written agreement with Melanie, Peter Schekeryk, and Amelanie Music, pursuant to which it was agreed, among other things, that the remaining obligations of Melanie, if any, to provide musical compositions to Kama Rippa under the Songwriter's Agreement would be deemed fully satisfied by the delivery to Kama Rippa of an additional twenty musical compositions written by Melanie, and the recording by Melanie of three of said twenty compositions. Said Agreement is herein referred to as the "Agreement Regarding Remaining Songwriting Obligations";

a copy of said Agreement is annexed hereto as Exhibit 3.

7. Said twenty musical compositions were duly delivered to plaintiff, and three of said twenty musical compositions were duly recorded by Melanie. Kama Rippa's Complaint in this action is based on the Agreement Regarding Remaining Songwriting Obligations and asserts, in substance, that Melanie is obligated under the Agreement Regarding Remaining Songwriting Obligations not only to "record" three of said twenty musical compositions, but to cause those three compositions to be commercially released on phonograph recordings to the record-buying public, despite the fact that no such contractual provision appears in the agreement itself; Melanie has asserted that the obligation to "record" does not carry with it the obligation to "release" recordings to the record-buying public By providing Kama Rippa with demonstration records of her musical compositions, the commercial saleability of those compositions to other performers and record companies is tremendously enhanced--and, moreover, the term "record" (which appears in the Agreement Regarding Remaining Songwriting Obligations) represents a completely different contractual obligation than the term "release" (which does not appear in the Agreement Regarding Remaining Songwriting Obligations).

8. The Agreement Regarding Remaining Songwriting Obligations incorporates by reference, with respect to the twenty musical compositions delivered thereunder, the reversion clause that appears in the Songwriter's Agreement (and which is quoted in ¶5 above), as follows:

"With respect to each of the aforesaid [twenty] musical compositions, Melanie Schekeryk . . . shall retain all rights granted to [her] pursuant to the Songwriter's Agreement . . ., including, without limitation, any causes of action or counterclaims that [she] may have arising out of same." (See Agreement Regarding Remaining Songwriting Obligations, at page 2A)

9. Pursuant to the above-quoted provisions of the Songwriter's Agreement and the Agreement Regarding Remaining Songwriting Obligations, Kama Rippa was required to remit to Melanie not later than August 15, 1973 full royalty payments for the period January 1, 1973 through June 30, 1973 for the musical compositions delivered by Melanie pursuant to these two agreements.* Kama Rippa failed to remit to Melanie by August 15, 1973 any royalty payment for the period January 1, 1973 to June 30, 1973.

10. On August 23, 1973, in view of Kama Rippa's default, the American Guild of Authors and Composers [hereinafter "AGAC"], Melanie's representative, sent to Kama Rippa a registered letter demanding immediate payment of said royalties, and specifically advising Kama Rippa "your retention of copyrights is placed in jeopardy failing immediate payment with interest" of said royalties. Said demand letter was delivered to Kama Rippa on August 24, 1973. A copy of said demand letter is annexed hereto as Exhibit 5.

11. By virtue of said demand letter and the contractual

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* The titles of said musical compositions are enumerated in Exhibit 4 annexed hereto.

clauses quoted above, if Kama Rippa failed to remit full royalties to Melanie by September 24, 1973, all rights in and to all musical compositions delivered by Melanie to Kama Rippa would revert (and, as will hereinafter appear, did revert as a matter of law) automatically to Melanie.

12. On August 31, 1973, a week after receipt of Melanie's demand letter, plaintiff commenced this action by filing its Complaint in this Court. The filing of this Complaint did not, of course, affect Melanie's undisputed right to payment of royalties (and thus did not affect the running of the 30-day reversion clause), since it is well-settled law in New York that a debtor must pay a creditor what he presently owes, notwithstanding the pendency of a lawsuit concerning an amount in dispute between the debtor and creditor; see, e.g., Liberty Die & Button Mould Corp. v. Consolidated Button & Buckle Corp., 160 N.Y.S.2d 728 (App.Div. 1st Dept. 1957); Kaplan v. Anita Eshay Fair Sex Jewels, Inc., 137 N.Y.S.2d 43 (Sup.Ct. N.Y.Cty. 1954), aff'd 287 App.Div. 1044, 141 N.Y.S.2d 508; Green v. Hempstead Bank, 27 App.Div. 2d 656, 276 N.Y.S.2d 671 (App.Div. 1st Dept. 1967).

13. Thus, Kama Rippa remained confronted with the choice of living up to its contractual obligation of paying to Melanie by September 24, 1973 the royalties which should have been paid to her not later than August 15, 1973, or losing to Melanie all rights in and to the musical compositions. Faced with its obligation to pay royalties or to bear the legal

consequences of continuing in its default, plaintiff thereupon engaged in a subterfuge in which it abused the legal process of the Supreme Court of the State of New York, County of New York, as follows.

14. On or about September 18, 1973, plaintiff made an ex parte application for an order of attachment in the Supreme Court of the State of New York, County of New York. In support of its ex parte application, in Special Term, Part II of that Court, plaintiff submitted to the issuing Judge a re-typed version of plaintiff's Federal Complaint, in haec verba except for a change in the designation of the court and the absence of federal jurisdictional allegations. In addition, plaintiff submitted an affidavit stating that, "no previous application for this relief has been made to any court or judge." Plaintiff in its ex parte application deliberately concealed from the issuing Judge in State Court the pendency of this action. Based on plaintiff's ex parte application, the State Court issued an order of attachment with respect to, and caused levies to be made upon, "the monies now in the hands of Kama Rippa Music, Inc. [i.e., the plaintiff itself] and the offices of Robert L. Casper, Esq. [Melanie's general counsel who, at the time of the levy, held no money for the defendants]." The order of attachment and levies were for the sum of $75,000.

15. For numerous reasons, the order of attachment, in which Kama Rippa purported to attach itself, was a gross

misuse of the State Court's process and was totally improper. Most glaring was the fact that the Civil Practice Law and Rules specifically prohibits an order of attachment where a defendant has a valid offset against a plaintiff's claim (see CPLR 6212(a)), and Kama Rippa, which has admitted that it owed Melanie $79,436 as of August 15, 1973, has thereby admitted that its liability to Melanie more than offset the order of attachment in the sum of $75,000; indeed, this statutory provision would appear to be designed to prevent against the very impropriety in which plaintiff here engaged in attempting to attach itself.* For this and other reasons, defendants promptly moved in State Court for an order vacating the order of attachment and levies thereunder; the numerous grounds supporting the motion to vacate were set forth in an affidavit submitted in State Court, a copy of which is annexed hereto as Exhibit 6.

16. As will hereinafter appear, defendants' motion to vacate the order of attachment and levies was eventually granted on the grounds that there was absolutely no legal foundation for the order of attachment. However, before the validity of the order of attachment and levies could be judicially determined, plaintiff undertook the second step in its artificial attempt to avoid the legal consequences of its continuing default of its obligation to pay Melanie her royalties. On September 20, 1973, the day after Kama Rippa

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* Ultimately, this was the very ground upon which Judge Markowitz vacated the order of attachment and levies; see Exhibit 9. Judge Markowitz therefore hold that no decision on the numerous other grounds for vacating the order of attachment was necessary.

caused levies to be made under the purported order of attachment which plaintiff had obtained on itself, Kama Rippa sent to AGAC the following in response to AGAC's demand letter of August 23, 1973: a statement showing royalties due for the period January 1, 1973 through June 30, 1973 in the amount of $79,436, accompanied by a check for only $4,436 and a copy of the order of attachment which Kama Rippa had caused to be levied upon itself. Thus, Kama Rippa took the position that it had judicially prevented itself from payment of $75,000 in royalties.

17. Melanie, through AGAC, refused to accept this partial payment of approximately 5% of the royalties due her. A letter was hand-delivered on the same day by AGAC to Kama Rippa, informing Kama Rippa that Melanie refused to accept this 5% partial payment, reiterating Melanie's demand for full payment of royalties, and again informing Kama Rippa that if Kama Rippa refused to pay Melanie her royalties by September 24, 1973, all rights in and to the musical compositions would revert automatically to Melanie. A copy of the September 20, 1973 letter from AGAC to Kama Rippa is annexed hereto as Exhibit 7.

18. Despite this full and complete warning, Kama Rippa continued in its default. On September 24, 1973, the last permissible date for payment of full royalties to Melanie before automatic reversion of the copyrights to Melanie, Kama Rippa again delivered to AGAC a writer's royalty statement

showing $79,436 due to Melanie, accompanied by a check for only $4,436 and a copy of the order of attachment and levies. Again, AGAC (on Melanie's behalf) refused to accept this 5% partial payment, and so informed Kama Rippa by a letter hand-delivered to Kama Rippa on that date. A copy of AGAC's letter of September 24, 1973 to Kama Rippa is annexed hereto as Exhibit 8.

19. Plaintiff continued in its default. By September 24, 1973, thirty days after Melanie's written demand delivered to Kama Rippa on August 24, 1973, Kama Rippa had failed to pay full royalties, having tendered instead only 5% of the royalties as above described (which Melanie refused to accept).

20. Kama Rippa persisted in its default. Finally, on November 2, 1973, defendants' motion for an order to vacate the order of attachment and levies was granted in State Court by the Hon. Jacob Markowitz, who specifically held, in a memorandum opinion:

> "There was no legal foundation for the order of attachment."

No dicta

A copy of Judge Markowitz' memorandum opinion is annexed hereto as Exhibit 9. On November 15, 1973 (the day before the parties were scheduled to appear before the Hon. Whitman Knapp on defendants' motion to vacate plaintiff's "Notice of Dismissal" in this action)--thirteen days after Judge Markowitz had declared the order of attachment as having been issued with no legal foundation--Kama Rippa transmitted to Robert L. Casper, Esq. (Melanie's general counsel, who was at the time

still subject to the order of attachment, as the formal order vacating the order of attachment had not yet been signed by Judge Markowitz) a check for $79,436 payable to Melanie as payment of royalties for the period January 1, 1973 through June 30, 1973. Judge Markowitz had not yet signed the formal order vacating the order of attachment and levies, which was finally signed and entered on November 23, 1973 (a copy of the formal order vacating the order of attachment is annexed hereto as Exhibit 10). Service of the Sheriff's official release of the levy was made on Mr. Casper on November 27, 1973 (a copy of said release is annexed hereto as Exhibit 11), who transmitted on that date Kama Rippa's royalty check to Melanie.

21. Thus, although Melanie was entitled to receive a full semi-annual royalty payment of $79,436 from Kama Rippa on August 15, 1973, and although if payment was not made by September 24, 1973 all rights in and to the musical compositions would revert automatically to Melanie, her royalties were not paid to her until November 27, 1973.

22. Based on the above facts, Melanie seeks in the instant motion an order from this Court granting her summary judgment on the following counterclaims:

Melanie's second counterclaim against Kama Rippa (which requests a declaratory judgment that all rights in and to the musical compositions delivered by Melanie to Kama Rippa have reverted to Melanie);

Melanie's third counterclaim (which seeks an injunction restraining Kama Rippa from holding itself out as having any interest in the musical compositions or from collecting royalties for the musical compositions); and

Melanie's fifth counterclaim against Kama Rippa (which requests compensatory and punitive damages for plaintiff's improperly obtaining the Order of Attachment in the Supreme Court of the State of New York, County of New York).

Need procedure for dismissing done often

AS TO MELANIE'S SECOND AND THIRD COUNTERCLAIMS AGAINST KAMA RIPPA

23. In view of the indisputable factual background described above, it is respectfully submitted that Melanie is entitled to a declaratory judgment that all rights in and to the musical compositions have reverted to her.

24. The language of the reversion clause (quoted in ¶ 5 above) is unambiguously clear. Kama Rippa was required to remit full royalties to Melanie for the period January 1, 1973 through June 30, 1973 not later than August 15, 1973; under the reversion clause, failure to remit full royalties to Melanie by September 24, 1973, 30 days after the written demand of August 24, 1973, resulted in the automatic reversion to Melanie of the musical compositions. Kama Rippa failed to pay her royalties despite due demand made by Melanie.

25. Instead, Kama Rippa gambled on attempting to create

artificially a judicial obstacle to the reversion of the copyrights by improperly obtaining an order of attachment. Melanie took the affirmative action of moving to vacate the order of attachment, and, in view of the impropriety of the order of attachment, it was vacated.

26. The Songwriter's Agreement (and, by incorporation, the Agreement Regarding Remaining Songwriting Obligations) states that the agreement "shall be interpreted and construed everywhere in accordance with the Laws of the State of New York" (see ¶ 19 of Songwriter's Agreement). Under New York law,

> "A void writ [of attachment] furnishes no justification for acts done under it and it is not necessary that it should be set aside before bringing an action. If a writ is irregular only, no action lies until it has been set aside, but when set aside, it ceases to be a protection for acts done under it." Siegel v. Northern Boulevard & 80th Street Corp., 31 App.Div.2d 182, 184, 295 N.Y.S.2d 804, 807 (1st Dept. 1968).

The court in Siegel quoted with approval the following language from the long-standing case of Kerr v. Mount, 28 N.Y. 659, 666 (1864):

> "[An order of attachment] having been set aside as irregular, it afforded no justification, afterwards, for acts previously done under it, to the party in whose favor it was issued. * * * As to him, it was then, as though no process whatever had been issued and the goods had been taken and detained by his order, without any process. * * * The moment it was set aside, the party became a trespasser ab initio." 31 App.Div.2d at 187, 295 N.Y.2d at 810.

See also Lawlor v. Magnolia Metal Co., 2 App.Div. 552, 554, 38 N.Y.S. 36, 38 (1st Dept. 1896), appeal dismissed 149 N.Y.

591 ("the effect of an order or judgment vacating the attachment is an adjudication that the property was illegally seized"); Weintraub v. Fitzgerald Bros. Brewing Co., 40 F.Supp. 473, 475 (S.D.N.Y. per Rifkind, J. 1941) (holding, in an action by a trustee in bankruptcy based upon an order of attachment--subsequently vacated--obtained before the debtor became a bankrupt, "on the date of the unlawful taking the bankrupt acquired a right of action in tort"); Minskoff v. Fidelity, 28 A.D.2d 85, 281 N.Y.S.2d 410 (1st Dept. 1967), aff'd 23 N.Y.2d 706 (an order vacating an order of attachment "finally determine[s] that there was no right to the attachment which was obtained").

27. It is respectfully submitted that the above-quoted rule is plainly dispositive of Melanie's counterclaim for reversion of all rights in and to the musical compositions.* Moreover, it is respectfully submitted that even if the order of attachment had had adequate legal foundation--and the State Court has already held otherwise--Melanie would be entitled to automatic reversion of the musical compositions, for the following reason.

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* In any event, to the extent that plaintiff's obtaining the order of attachment and levy upon itself were to constitute a defense to Melanie's claim for reversion of copyrights, then to that same extent Melanie would be entitled to reversion of the copyrights as damages sustained by virtue of plaintiff's improper obtaining of the order of attachment and levies. Such an alternative cause of action is asserted in Melanie's sixth counterclaim against Kama Rippa (at page 26 of defendants' Answer and Counterclaims).

28. It is clear that if the order of attachment and levy that plaintiff caused to be made upon itself had not been made, plaintiff's failure to remit full royalties to Melanie by September 24, 1973 would result in the automatic reversion to Melanie of all rights in and to the musical compositions. The only issue on this motion--which is a legal and not a factual issue--is whether plaintiff's improper obtaining of the order of attachment excused its default. In this regard, the well-settled law is

> "a legal prohibition preventing performance is not a defense if the situation leading to the prohibition is attributable to the acts of the party asserting the defense." 6 Corbin, Contracts, §1352.

29. This rule applies in New York State and prevails elsewhere. Deponent is respectfully submitting with this affidavit an accompanying memorandum of law which clearly establishes that Kama Rippa's obtaining of the order of attachment and levy upon itself does not excuse its default in failing to pay Melanie her royalties when due.

30. Kama Rippa has a history of failing to live up to its contractual obligation to pay Melanie timely royalties. Indeed, plaintiff defaulted in its obligation to pay Melanie timely royalties for the very six-month period that preceded the six-month period now at issue, i.e., the six-month period ending December 31, 1972. Therefore, on March 2, 1973, AGAC delivered by registered letter to plaintiff's affiliate, Kama Sutra Music, Inc., written demand for royalties on Melanie's

behalf (see Exhibit 12). Plaintiff persisted in its refusal to pay Melanie her royalties, and on April 11, 1973 Melanie's general counsel sent to plaintiff and Kama Sutra Music, Inc. notice that because of plaintiff's default the copyrights had reverted to Melanie (see Exhibit 13). Plaintiff then objected on the technicality that AGAC's demand letter had been addressed to the wrong corporate entity, Kama Sutra Music, Inc., rather than its affiliate Kama Rippa Music, Inc. (the plaintiff). Defendants agreed to withdraw their claim for reversion of the copyrights at that time in exchange for payment, albeit late, of royalties then due--because plaintiff conditioned payment of royalties which were unquestionably due to Melanie upon Melanie's agreement to withdraw the claim for reversion of the copyrights which had already accrued to her. A copy of defendants' letter withdrawing their copyright claim, but expressly reserving the right to invoke the same reversion clause in the event of future defaults in royalty payments by plaintiff, is attached hereto as Exhibit 14.

Surplusage not relevant

31. The reversion clause stating that time of royalty payments is of the essence was not simply a hidden clause in a contract, but was a considered provision which the parties specifically added to the contract as a rider.

> "Since it is settled both at law and in equity that the parties may make time of the essence, even where damages may compensate for the delay, it is clear that they may do so by an express declaration that 'time is of the essence' . . . . Where time is made the essence of the contract,

it is binding upon the parties; and a party cannot complain because the time limit causes him hardship." 10 N.Y.Jur. Contracts, §270.

The parties specifically provided for automatic reversion to Melanie of all rights in and to the musical compositions if Kama Rippa defaulted in timely royalty payments to Melanie for a period exceeding 30 days from written demand. Written demand was made to Kama Rippa on August 24, 1973. Payment was not made by September 24, 1973 and was not made until November 27, 1973, and then only after Melanie had been forced to undertake legal action in State Court to vacate the improperly obtained order of attachment and levies, and only after Melanie had been forced to commence legal proceedings in this Court for payment of royalties and for a declaratory judgment of reversion of the copyrights. Kama Rippa's continuing brazen default unequivocally resulted, by express contractual terms, in the automatic reversion to Melanie of all rights in and to the musical compositions delivered by Melanie to Kama Rippa.

AS TO MELANIE'S FIFTH COUNTERCLAIM AGAINST KAMA RIPPA

32. Melanie's fifth counterclaim against Kama Rippa seeks compensatory and punitive damages for Kama Rippa's abuse of process in improperly obtaining the order of attachment.

33. The defendants incurred legal expenses in the sum of $6,425. Annexed hereto as Exhibit 15 is a supplementary

affidavit by deponent particularizing the computation of these legal fees.

> "Expenses incurred for the services of legal counsel are not, generally, an appropriate element of damages . . . . However, the rule is otherwise where the suit to recover such expenses is predicated on a wrongful attachment--because a warrant of attachment is 'an extraordinary process, often [causing] great damages, and is designed, ordinarily, for the purpose of being used sparingly only.' . . . . As stated by the Court of Appeals in Tyng v. American Surety Co., 174 N.Y. 166, 168, 66 N.E. 668, 669: 'That counsel fees are within the language of such an undertaking does not admit of doubt * * *". A. C. Israel Commodity Co. v. Banco Do Brasil, S.A., 50 Misc.2d 362, 270 N.Y.S.2d 283, 285-286 (S.Ct. N.Y.Cty. 1966); and see authorities cited therein.

See also Siegel v. Northern Boulevard & 80th Street Corp., 31 App.Div.2d 182, 188, 295 N.Y.S.2d 804, 811 (1st Dept. 1968) ("While we agree that, generally, there can be no recovery as damages for counsel fees incurred in defending against process lawfully issued and legal proceedings lawfully taken thereon, we are not dealing with such a case. The prevailing view is that reasonable counsel fees incurred or expended in defending against a wrongful attachment are recoverable.").

34. The affidavit of plaintiff's counsel in support of plaintiff's motion to dismiss counterclaims asserts (at ¶ 54) that Judge Markowitz refused to grant counsel fees. In fact, the order of Judge Markowitz states in this regard "ORDERED, that this court has not passed upon defendant's right, if any, under CPLR 6212(b)," the statutory provision for recovery of damages on vacating of an order of attachment. As a procedural matter, Judge Markowitz, who had been informed of

Melanie's instant action in this Court against plaintiff and had been provided with a copy of defendants' Answer and Counterclaims in this action, merely deferred to the action pending in this Court for a determination of damages. This was the procedure followed in the cases quoted in paragraph 33, above: attorneys fees, although clearly recoverable, are to be recovered in an action for damages resulting from an improper order of attachment, and are not recoverable during the motion to vacate.

35. The defendants are also entitled to interest of 6% of $75,000 for the period of August 15, 1973 (the date full royalties were due) until November 27, 1973 (the date the royalties were finally paid).

> "[A] proper element of damage for the detention of plaintiff's securities and cash under the warrants of attachment was the legal rate of interest, and it was not incumbent on the plaintiff to offer proof of actual loss or the ability to invest the funds at 6% interest." Subin v. United States Fidelity & Guaranty Co., 12 A.D.2d 49, 53, 208 N.Y.S.2d 276, 281 (1st Dept. 1960).

The amount of interest Melanie is entitled to at 6% (CPLR 5004) from August 15, 1973 through November 27, 1973 on $75,000 is $1,275 which, added to the $6,425 in counsel fees, entitles Melanie to $7,700 as compensatory damages.

36. In addition, it is respectfully submitted that plaintiff's gross misuse of the State Court's legal process in obtaining the order of attachment fully justifies the imposition of exemplary damages (which are demanded in defen-

dants' fifth counterclaim). In an action for an unlawful attachment,

> "the complaint need not allege malice or want of probable cause in order to state a cause of action. However, if such facts may be alleged and proved, exemplary damages may be sought." 11 Carmody-Wait 2d, §76:194, p. 657.

Plaintiff's actions in this matter were absolutely without justification and blatantly unlawful. Plaintiff is a large corporation which misused its financial resources and its ability to post a security bond and pay damages, and put these defendants to considerable time, expense and worry; Melanie, as a professional in the field of music, is dependant upon royalty payments. On information and belief, plaintiff is a corporation of considerable financial strength; its parent company, Viewlex Inc., is a public company whose shares are traded on the American Stock Exchange and which reported in its 1972 annual report assets of $43,879,400. It is respectfully submitted that plaintiff's actions fully warrant the imposition of punitive damages and that the sum of $25,000 in punitive damages is an appropriate sum to deter Kama Rippa from ever engaging in any such illegal machinations again and to deter any other company which might ever be so inclined.

Also is also warranted

WHEREFORE, it is respectfully submitted that the instant cross-motion should be granted.

Sworn to before me this
19th day of December, 1973. _____

MONA RYAN
NOTARY PUBLIC, State of New York
No. 24-6723360
Qualified in Kings County
Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

--and--

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

- -x

- 164A

ANSWER AND COUNTERCLAIMS

Civil Action No. 73 CIV. 3789

Defendants, by their undersigned attorney, as and for their answer and counterclaims:

1. Deny the truth of each and every allegation contained in paragraphs "TWELFTH", "THIRTEENTH", "FIFTEENTH", "SIXTEENTH", "EIGHTEENTH", "NINETEENTH", and "TWENTY-FIRST" of the Complaint.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "SECOND" of the Complaint.

3. As to paragraph "THIRD" of the Complaint, defendants state that they are citizens of the State of New Jersey for purposes of determining federal jurisdiction based upon diversity of citizenship.

4. As to paragraph "SIXTH" of the Complaint, deny each and every allegation thereof except state that on or about May 31, 1968, Amelanie Music, Two People Music, Kama Sutra Music, Inc., and Kama Rippa Music, Inc. entered into a written agreement (hereinafter called the "Co-Publishing Agreement"), and defendants respectfully refer the Court to said agreement for its terms and conditions.

5. As to paragraph "SEVENTH" of the Complaint, deny each and every allegation thereof except state that on or about May 31, 1968, Kama Rippa Music, Inc., Amelanie Music, and Melanie Schekeryk (hereinafter "Melanie") entered into a written agreement (hereinafter called the "Songwriter's Agreement"), and defendants respectfully refer the Court to said agreement for its terms and conditions.

6. As to paragraph "EIGHTH" of the Complaint, deny each and every allegation thereof except state that on or about August 24, 1971, Kama Rippa Music, Inc., Amelanie Music, Melanie, and Peter Schekeryk entered into a written agreement (hereinafter called the "Agreement Regarding Remaining Songwriting Obligations"), and defendants respectfully refer the Court to said agreement for its terms and conditions.

7. As to paragraph "NINTH" of the Complaint, deny each and every allegation of the Complaint insofar as said allegations purport to allege that the recording of said compositions constituted, or was said by defendants' representative to constitute, less than full satisfaction of the remaining obligations of the defendants under the Agreement Regarding Remaining Songwriting Obligations.

8. As to paragraphs "TENTH" and "ELEVENTH" of the Complaint, deny each and every allegation of the Complaint insofar as said allegations purport to allege that defendants were or are obligated to release for public sale and distribution recordings of the compositions referred to therein.

9. As to paragraphs "FOURTEENTH", "SEVENTEENTH", and "TWENTY-SECOND" of the Complaint, defendants admit or deny the allegations contained therein to the extent admitted or denied elsewhere in this Answer.

10. As to paragraph "TWENTIETH" of the Complaint, deny each and every allegation contained therein insofar as said allegations purport to allege that defendants at any time did not intend to fulfill all obligations under the Agreement Regarding Remaining Songwriting Obligations or that defendants were or are obligated to release any of said recorded musical compositions.

11. As to paragraph "TWENTY-FOURTH" of the Complaint, deny each and every allegation of the Complaint insofar as

said allegations purport to allege that plaintiff is entitled to relief at law, in equity, or otherwise.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

12. The Complaint fails to state a claim against any defendant upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

13. The alleged agreement set forth in the Complaint herein, insofar as it alleges any agreement by any defendant to release any of said three musical compositions, by its terms was not to be performed within one year from the making thereof and neither said alleged agreement nor any note or memorandum thereof was ever made in writing and subscribed by any defendant or by the lawful agent of any defendant, and said alleged agreement is void.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

14. The prosecution of this action is barred by laches.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

15. Plaintiff's alleged rights under the alleged contract were waived by plaintiff.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE
(AS TO PLAINTIFF'S "SECOND CAUSE OF ACTION" AND "THIRD CAUSE OF ACTION")

16. In and by the terms of the Agreement Regarding Remaining Songwriting Obligations, it was provided and agreed between plaintiff and defendants that $75,000 in liquidated damages would be the maximum compensation and sole remedy for any failure by Melanie to record three musical compositions in accordance with the provisions of said agreement. (Notwithstanding the foregoing legal affirmative defense as to plaintiff's "Second Cause of Action" and "Third Cause of Action", defendants deny all liability whatsoever with respect to each and every alleged cause of action in plaintiff's Complaint, for the reasons stated elsewhere in this Answer.)

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

17. Defendants repeat and reallege each and every allegation of paragraphs 19 through 102, inclusive, of this Answer.

18. Plaintiff has been guilty of inequitable conduct against defendants, and, therefore, among other things, is not entitled to any relief, equitable or otherwise.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE
AND FIRST COUNTERCLAIM AGAINST PLAINTIFF

19. Melanie and Peter Schekeryk are citizens of the State of New Jersey. They are the principals of partner-

ships known and doing business as Amelanie Music and Two People Music. This claim is based upon diversity of citizenship. The amount in controversy, exclusive of interest and costs, exceeds $10,000.

20. On information and belief, Kama Rippa Music, Inc. is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the City, County, and State of New York.

21. On or about May 31, 1968, a written agreement was entered into between Melanie, on the one hand, and Kama Rippa Music, Inc. (hereinafter "Kama Rippa") and Amelanie Music (jointly referred to in said agreement as "Publisher"), on the other hand. This agreement is referred to herein as the "Songwriter's Agreement".

22. In and by said Songwriter's Agreement, it was provided and agreed that Melanie would deliver to Kama Rippa certain musical compositions composed by Melanie. From and after the date of said Songwriter's Agreement, Melanie did deliver said musical compositions, and otherwise duly performed all the conditions of said contract on her part (including all extensions thereof).

23. On or about August 24, 1971, Kama Rippa did enter into a written agreement with Melanie, Peter Schekeryk, and Amelanie Music, pursuant to which it was agreed, among other things, that the remaining obligations of Melanie, if any, under the Songwriter's Agreement (as extended) would be

deemed fully satisfied by the delivery to Kama Rippa of an additional twenty musical compositions written by Melanie, and the recording by Melanie of three of said twenty compositions. Said agreement is herein referred to as the "Agreement Regarding Remaining Songwriting Obligations".

24. Said twenty musical compositions were duly delivered to plaintiff, and three of said twenty musical compositions were duly recorded by Melanie, and the defendants otherwise duly performed all the conditions, if any, of said contract on their part.

25. Pursuant to the terms of the Agreement Regarding Remaining Songwriting Obligations, it was agreed and provided, among other things, that Melanie retains all rights with respect to each of the musical compositions delivered thereunder as had been granted to Melanie by the original Songwriter's Agreement and the Co-Publishing Agreement described in paragraph 40 of this Answer.

26. Pursuant to said Songwriter's Agreement, and by incorporation pursuant to said Agreement Regarding Remaining Songwriting Obligations, it was provided and agreed that Kama Rippa would render to Melanie on or about each August 15, for the six-month period ending June 30, royalty statements showing the amount of compensation due to Melanie, accompanied by remittance to Melanie of all such royalties; it was further provided and agreed that payment of royalties when due is of the essence, and that if Kama Rippa failed to

account timely or pay royalties timely, and if such default continued for 30 days after written demand for said accounting or royalties, then all rights in and to all musical compositions delivered by Melanie would revert automatically to Melanie.

27. On or about August 15, 1973, plaintiff failed, neglected and refused to render to Melanie a royalty statement accompanied by royalty payment for the six-month period ending June 30, 1973.

28. Thereafter, Melanie duly demanded, by registered mail delivered to and accepted by Kama Rippa, that Kama Rippa render to Melanie a royalty statement accompanied by royalty payment for the six-month period ending June 30, 1973.

29. Notwithstanding the obligations of plaintiff, and notwithstanding due demand, plaintiff has continued to default in the aforesaid obligations. To and including today, plaintiff has failed, neglected, and refused to render to Melanie a royalty statement accompanied by royalty payment for the six-month period ending June 30, 1973.

30. By reason of the foregoing, Melanie is entitled to and seeks a full and complete accounting for and payment of said royalties.

31. In doing all the things herein alleged, Kama Rippa acted maliciously and is guilty of a wanton disregard of the rights of Melanie and by reason thereof Melanie demands

exemplary and punitive damages of $1,000,000.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE
AND SECOND COUNTERCLAIM AGAINST PLAINTIFF

32. This is a counterclaim for a declaratory judgment pursuant to 28 U.S.C. §2201, for the purpose of determining a question of actual controversy between the parties.

33. Defendants repeat and reallege each and every allegation contained in paragraphs 19 through 31, inclusive, of this Answer.

34. By reason of the foregoing, defendants seek a declaratory judgment that all rights in and to all musical compositions delivered to plaintiff by Melanie have reverted to Melanie, including but not limited to all copyrights therein and all renewal copyrights therein (together with the administration rights thereto), throughout the world in their entirety.

35. By reason of the foregoing, Melanie asks that this Court order that all documents, files, copyright certificates, copies of sub-publishing agreements and license agreements of every type and nature affecting and relating to the aforesaid compositions be delivered forthwith to Melanie.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE
AND THIRD COUNTERCLAIM AGAINST PLAINTIFF

36. Defendants repeat and reallege each and every

allegation contained in paragraphs 19 through 35, inclusive, of this Answer.

37. By reason of the foregoing, defendants seek a mandatory injunction perpetually restraining and enjoining Kama Rippa, its deputies, agents, employees, representatives, and other persons in concert or participation, from holding itself out as having any interest whatsoever in said musical compositions, or from collecting or receiving any moneys in connection with or with respect to said musical compositions.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE
AND FOURTH COUNTERCLAIM AGAINST PLAINTIFF
AND FIRST CLAIM AGAINST KAMA SUTRA MUSIC, INC.

38. Defendants repeat and reallege each and every allegation contained in paragraphs 19 through 37, inclusive, of this Answer.

39. On information and belief, Kama Sutra Music, Inc. (hereinafter "Kama Sutra") is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the City, County, and State of New York.

40. On or about May 31, 1968, a written agreement was entered into between Amelanie Music and Two People Music (jointly referred to in said agreement as "Participant"), on the one hand, and Kama Rippa and Kama Sutra (jointly referred to in said agreement as "Publisher"), on the other hand.

This agreement is herein referred to as the "Co-Publishing Agreement".

41. Amelanie Music and Two People Music did duly perform all the conditions of said Co-Publishing Agreement on their part.

42. In and by said Co-Publishing Agreement, it was provided and agreed that "Publisher" and "Participant" would "co-publish" certain musical compositions, that the copyrights for said compositions would be registered jointly in the names of Publisher and Participant, and that Publisher and Participant would each have an undivided one-half share in and to the right, title and interest (including but not limited to profits derived therefrom) of each of said musical compositions.

43. In and by said Co-Publishing Agreement, it was further provided and agreed that Kama Rippa and Kama Sutra would collect all revenue, income and sums derived from said musical compositions, and would pay to Amelanie Music and Two People Music 50% of the net income received and derived from said musical compositions.

44. In and by said Co-Publishing Agreement, it was further provided and agreed that all sums payable to Amelanie Music and Two People Music by Kama Sutra and Kama Rippa would be accounted for in writing, with payment at the time of accounting, within 40 days after the end of each calendar quarter.

45. Notwithstanding the foregoing, Kama Rippa and Kama Sutra have wilfully, maliciously, and deliberately failed, refused, and neglected to render to Amelanie Music and Two People Music an accounting in writing for periods covered by said agreement, and have failed, refused, and neglected to render payment due and owing with respect to said accountings.

46. By reason of the foregoing, the defendants seek a full and complete accounting for and payment of all of said royalties.

47. In doing all the things herein alleged, Kama Rippa and Kama Sutra acted maliciously and are guilty of a wanton disregard of the rights of the defendants, and by reason thereof the defendants demand exemplary and punitive damages in the sum of $1,000,000.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE AND FIRST CLAIM AGAINST BUDDAH RECORDS, INC.

48. Defendants repeat and reallege each and every allegation contained in paragraph 19 of this Answer.

49. On information and belief, Buddah Records, Inc. (hereinafter "Buddah") is a corporation organized and existing under the law of the State of New York, with its principal place of business in the City, County, and State of New York, and is an affiliate of plaintiff Kama Rippa, both of which are owned and controlled by Viewlex, Inc., a publicly-

owned company with total assets, as of May 31, 1972, of $43,879,400.

50. On or about October 28, 1968, Melanie and Buddah entered into a written agreement with respect to the release by Buddah to the record-buying public of phonograph records embodying the performances of Melanie (hereinafter "Artist Recording Agreement").

51. Melanie is an internationally renowned musician, songwriter, singer, and entertainer. The value to a record company of a contract for the right to release to the public recordings embodying her performances is of immense value.

52. On or about October 28, 1968, Peter Schekeryk and Buddah entered into a written agreement for the production by Peter Schekeryk, among other things, of the master recordings of performances by Melanie to be delivered under the aforementioned Artist Recording Agreement, for a term concurrent with that agreement (hereinafter referred to as the "Producer's Agreement").

53. In and by said Artist Recording Agreement, it was provided and agreed that the term of said contract was limited to the period commencing October 1, 1968 and terminating September 30, 1969. By express provision, Melanie granted Buddah two consecutive options to extend said term for one year per option, each of said two consecutive periods of extension to commence immediately upon the date that the term would otherwise have expired.

54. In and by said Artist Recording Agreement, it was provided and agreed that Melanie would perform and deliver to Buddah master recordings of a minimum of six seven-inch 45 R.P.M. record sides (hereinafter "single recordings") and one twelve-inch 33-1/3 R.P.M. long-playing record (hereinafter "L.P. recordings") per term, and such additional master recordings, if any, as the parties would subsequently agree to, and that Buddah would cause the release of said recordings to the public during the term of the agreement.

55. Melanie and Peter Schekeryk duly performed all the conditions of said Artist Recording Agreement and Producer's Agreement on their part. Pursuant to said Artist Recording Agreement and Producer's Agreement, and during the term (as extended) thereof, Melanie and Peter Schekeryk delivered or caused to be delivered to Buddah master recordings as provided in said agreement, and Buddah caused some, but not all, of said master recordings to be commercially produced into phonograph records and released to the record-buying public during the term of the agreement.

56. On or about May 14, 1971, Melanie, Peter Schekeryk, Buddah, and Paramount Records (a division of Famous Music Corporation, a subsidiary of Gulf & Western Industries, Inc.) entered into a written agreement with respect to all remaining rights, if any, of Buddah under the Artist Recording Agreement between Buddah and Melanie (hereinafter "Recording Settlement Agreement").

57. In and by said Recording Settlement Agreement, it was agreed and provided, among other things, that Paramount Records would pay to Buddah the sum of $500,000 for the remaining rights, if any, of Buddah under the Artist Recording Agreement between Buddah and Melanie. Said $500,000 has been fully paid to Buddah.

58. After May 14, 1971, and continuing to and including today, Buddah did wilfully, maliciously, and deliberately fail, neglect, and refuse to perform the conditions of said Artist Recording Agreement, said Producer's Agreement, and said Recording Settlement Agreement in that Buddah did cause to be released to the record-buying public single recordings and L.P. recordings embodying performances of Melanie contained on master recordings delivered by Melanie and Peter Schekeryk to Buddah prior to May 14, 1971 but not released to the record-buying public by Buddah prior to that date.

59. By reason of the foregoing Melanie and Peter Schekeryk have sustained damages in the sum of $5,000,000, no part of which has been paid.

60. In doing all the things herein alleged, Buddah acted maliciously and is guilty of a wanton disregard of the rights of the defendants, and by reason thereof the defendants demand exemplary and punitive damages in the sum of $1,000,000.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE
AND SECOND CLAIM AGAINST BUDDAH RECORDS, INC.

61. Defendants repeat and reallege each and every allegation contained in paragraphs 48 through 60, inclusive, of this Answer.

62. From and after the cessation of the right of Buddah to release to the public previously unreleased phonograph recordings embodying the performances of Melanie, Buddah wilfully, maliciously, and deliberately did cause the release of said recordings, with the intent and effect of falsely informing and causing the record-buying public to believe that Melanie was a performer under contract to Buddah, when in fact such was false and was known by Buddah to be false.

63. In connection therewith, Buddah did use the name, portrait, and picture of Melanie within the State of New York, and elsewhere, for advertising purposes and for the purposes of trade without the consent of Melanie.

64. By reason of the foregoing Buddah has violated the Civil Rights Law of the State of New York, Sections 50 and 51 thereof, and Melanie has suffered damages in the amount of $5,000,000.

65. In doing all the things herein alleged, plaintiff acted maliciously and was guilty of a wanton disregard of the rights of Melanie, and by reason thereof Melanie demands exemplary and punitive damages in the sum of $1,000,000.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE
AND THIRD CLAIM AGAINST BUDDAH RECORDS, INC.

66. Defendants repeat and reallege each and every allegation contained in paragraphs 48 through 65, inclusive, of this Answer.

67. After May 14, 1971, Buddah did cause to be released to the record-buying public L.P. recordings embodying performances of Melanie under circumstances constituting a wilful, malicious and intentional deceit on the record-buying public, by causing to be released to the record-buying public L.P. recordings containing songs previously recorded by Melanie and previously released for public distribution by Buddah without properly and adequately informing the record-buying public that said L.P.'s contained performances previously released to and purchased by the record-buying public. The unlawful and deceptive release by Buddah of said L.P. recordings was in each instance without the knowledge or consent of the defendants herein.

68. By reason of the foregoing, Melanie has suffered damages to her financial, commercial, and artistic interests, and has sustained damages in the sum of $5,000,000, no part of which has been paid.

69. In doing all the things herein alleged, Buddah acted maliciously and is guilty of a wanton disregard of the rights of Melanie, and by reason thereof Melanie demands exemplary and punitive damages in the sum of $1,000,000.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE
AND FOURTH CLAIM AGAINST BUDDAH RECORDS, INC.

70. Defendants repeat and reallege each and every allegation contained in paragraphs 48 through 69, inclusive, of this Answer.

71. After May 14, 1971, in releasing to the record-buying public L.P. recordings embodying performances of Melanie, Buddah did falsely represent to the public that Peter Schekeryk was the producer of said L.P. recordings, when in truth and in fact Peter Schekeryk was not the producer of said L.P. recordings, which Buddah well knew. In addition, Buddah did cause to be released to the record-buying public records made from unfinished master recordings whose release was not approved or authorized by the defendants.

72. By reason of the foregoing, Melanie and Peter Schekeryk have suffered damages in the sum of $1,000,000 each, no part of which has been paid.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE
AND FIFTH CLAIM AGAINST BUDDAH RECORDS, INC.

73. Defendants repeat and reallege the allegations contained in paragraph 48 through 72, inclusive, of this Answer.

74. It was provided and agreed by said Artist Recording Agreement and by said Producer's Agreement that accountings for royalties payable under each of said agreements would be made on a semi-annual basis, together with accrued royalties,

on September 1 for the period ending the preceding June 30, and on March 1 for the period ending the preceding December 31.

75. Notwithstanding the foregoing, Buddah has wilfully, maliciously, and deliberately failed, refused and neglected to render to Melanie and Peter Schekeryk an accounting in writing for periods covered by said agreement, and has failed, refused, and neglected to render payment due and owing with respect to said accountings.

76. By reason of the foregoing, Melanie and Peter Schekeryk seek a full and complete accounting for and payment of all of said royalties.

77. In doing all the things herein alleged, Buddah acted maliciously and is guilty of a wanton disregard of the rights of the defendants, and by reason thereof the defendants demand exemplary and punitive damages in the sum of $1,000,000.

AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE
AND SIXTH CLAIM AGAINST BUDDAH RECORDS, INC.

78. Defendants repeat and reallege each and every allegation contained in paragraphs 48 through 77 of this Answer.

79. Previous to the events hereafter related in this cause of action, Melanie entered into a written agreement with Paramount Records (a division of Famous Music Corp., a

subsidiary of Gulf & Western Industries, Inc.) with respect to the release by Paramount Records to the record-buying public of phonograph recordings embodying the performances of Melanie (hereinafter "Melanie-Paramount Contract").

80. The existence of said Melanie-Paramount Contract was known to Buddah and to the officers, directors, employees, and agents of Buddah.

81. In and by the terms of said Melanie-Paramount Contract, it was agreed that Paramount Records would cause to be released to the record-buying public phonograph records containing recorded musical performances of Melanie, and that Melanie would be paid royalties based upon a percentage of sales of said phonograph records.

82. From and after May 14, 1971, Buddah did cause to be released to the record-buying public, unlawfully, maliciously, wilfully, deliberately, and without the knowledge or consent of Melanie, records containing recorded musical performances of Melanie, with the intention and effect of substantially decreasing sales of Melanie's phonograph records released by Paramount Records, and with the malicious and deliberate intention of destroying Melanie's musical career.

83. By reason of the foregoing, Melanie has suffered damages in the amount of $5,000,000, no part of which has been paid.

84. In doing all the things herein alleged, plaintiff acted maliciously and was guilty of a wanton disregard of the rights of Melanie, and by reason thereof Melanie demands exemplary and punitive damages in the sum of $1,000,000.

AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE AND SEVENTH CLAIM AGAINST BUDDAH RECORDS, INC.

85. Defendants repeat and reallege each and every allegation contained in paragraphs 48 through 84, inclusive, of this Answer.

86. By reason of the foregoing, defendants seek a mandatory injunction perpetually restraining and enjoining Buddah Records, Inc., its deputies, agents, employees, representatives, or other persons in concert or participation, from releasing to the record-buying public phonograph recordings containing musical performances by Melanie which were not released by Buddah Records, Inc. prior to May 14, 1971.

87. By reason of the foregoing, defendants seek an order of this Court directing Buddah Records, Inc. to (1) cause to be removed from all outlets and channels of sale and distribution all phonograph recordings above-described which have heretofore been released for distribution and sale to the record-buying public, and (2) pay to defendants all gains and profits derived by plaintiff resulting from all distributions and sales heretofore made to the record-buying public for or with respect to the above-described phonograph recordings.

AS AND FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE
AND EIGHTH CLAIM AGAINST BUDDAH RECORDS, INC.

88. Defendants repeat and reallege each and every allegation contained in paragraphs 48 through 87, inclusive, of this Answer.

89. By reason of the foregoing, defendants seek a mandatory injunction perpetually restraining and enjoining Buddah Records, Inc., its deputies, agents, employees, representatives, or other persons in concert or participation, from offering for sale to the record-buying public L.P. recordings containing songs recorded by Melanie and released prior to May 14, 1971, except insofar as said songs are offered for sale in the same recorded form and packaging as contained in L.P. recordings originally offered for sale at the time of their initial release.

90. By reason of the foregoing, defendants seek an order of this Court directing Buddah Records, Inc. to (1) cause to be removed from all outlets and channels of sale and distribution all phonograph recordings above-described which have heretofore been released for distribution and sale to the record-buying public, and (2) pay to defendants all gains and profits derived by plaintiff resulting from all distributions and sales heretofore made to the record-buying public for or with respect to the above-described phonograph recordings.

AS AND FOR A NINETEENTH AFFIRMATIVE DEFENSE AND FIFTH COUNTERCLAIM AGAINST PLAINTIFF

91. Defendants repeat and reallege each and every allegation contained in paragraphs 19 through 47, inclusive, of this Answer.

92. On or about August 31, 1973, plaintiff filed its Complaint in this action in the United States District Court for the Southern District of New York.

93. Previous to the filing of said Complaint, and on or about August 24, 1973, Melanie served upon Kama Rippa, by registered letter delivered to and accepted by Kama Rippa, due demand for all royalties due and owing to her by Kama Rippa for the six-month period ending June 30, 1973.

94. Pursuant to the Songwriter's Agreement, Co-Publishing Agreement, and Agreement Regarding Remaining Songwriting Obligations, if Kama Rippa failed to pay full and complete royalties to Melanie within thirty days of August 24, 1973, all rights in and to all musical compositions delivered by Melanie to Kama Rippa would (and did) revert automatically to Melanie.

95. One week prior to the expiration of said thirty-day period, or on or about September 17, 1973, Kama Rippa did attempt to obtain, and did obtain, from a Judge of the Supreme Court of the State of New York, at a Special Term, Part II thereof, a purported Order of Attachment. Said

purported Order of Attachment was issued solely in response to and on the basis of an affidavit of a representative of Kama Rippa (acting on behalf of and with the consent of Kama Rippa) which was submitted to said Judge and Court in an ex parte application, without notice to the defendants and without a hearing being afforded to the defendants.

96. Kama Rippa, in said ex parte application, did wilfully, deliberately, maliciously, and illegally conceal from said Judge and Court, and did wilfully, deliberately, maliciously, and illegally misrepresent to said Judge and Court, material facts, including but not limited to the following: (a) plaintiff falsely asserted to said Judge and Court that a lawsuit commenced in February, 1971, in the Supreme Court of the State of New York entitled Buddah Records, Inc., et al. v. Paramount Records Inc., Amelanie Music, et al. had been fully settled by the parties, and that no counterclaims asserted by the defendants against plaintiff were still pending, whereas in truth and in fact, at the time of said false representation and to and including today, said lawsuit had been and is only partially settled and counterclaims asserted against plaintiff by the defendants in that action in the total amount of $2,000,000 were and are still pending in said lawsuit; (b) plaintiff falsely asserted to said Judge and Court that no previous application for the relief being sought by plaintiff in the Supreme Court of the State of New York had been made to any other court or judge, whereas in truth and in fact the Complaint in this action was then pending in

the United States District Court for the Southern District of New York; (c) plaintiff falsely asserted to said Judge and Court that the defendants were not residents of the State of New York, whereas in truth and in fact the defendants were and are residents of the State of New York for purposes of determining the applicability of Section 6201 of the Civil Practice Law and Rules of the State of New York and the legality of the issuance of an order of attachment and levies thereunder; (d) plaintiff falsely asserted to said Judge and Court that the purpose of plaintiff's ex parte application for an Order of Attachment was to prevent an alleged prospective removal by defendants of defendants' assets from the State of New York, whereas in truth and in fact the purpose of plaintiff's application was to attempt unlawfully to avoid the payment to defendants of moneys then due and owing to defendants, and to attempt unlawfully to falsely construct and fabricate an alleged defense in the future to the anticipated valid claim of Melanie that because of plaintiff's failure to remit royalties due and owing to her all rights in and to all musical compositions delivered by Melanie to plaintiff revert automatically to her.

97. As a result of said misrepresentation, Kama Rippa did wilfully, deliberately, maliciously and illegally cause said Judge and Court to issue a purported Order of Attachment upon certain moneys in the hands of Kama Rippa and the offices of Robert L. Casper, P.C., in which the defendants had an interest, and did wilfully, deliberately, maliciously and

illegally cause the Sheriff of New York County to purport to levy upon and attach said moneys.

98. By doing the foregoing, plaintiff abused the processes of the Supreme Court of the State of New York and of the United States District Court for the Southern District of New York.

99. By reason of the foregoing, defendants were wrongfully deprived of their property, and were compelled to employ an attorney to recover their property, and have otherwise been damaged in all in the sum of $50,000.

100. In doing all the things herein alleged, Kama Rippa acted maliciously and is guilty of a wanton disregard of the rights of defendants, and by reason thereof each defendant demands exemplary and punitive damages in the sum of $1,000,000.

AS AND FOR A TWENTIETH AFFIRMATIVE DEFENSE AND SIXTH COUNTERCLAIM AGAINST PLAINTIFF

101. Defendants repeat and reallege each and every allegation contained in paragraphs 19 through 47 and 91 through 100, inclusive, of this Answer.

102. If Kama Rippa asserts with respect to defendants' affirmative defenses or counterclaims herein any defense or explanation dependent or based upon or relating to the aforementioned purported Order of Attachment or purported levies

thereunder, and if said defense or explanation is accepted by or prevails in this Court to any extent, then to that same extent the defendants herein have been further damaged by plaintiff's abuse of process, and as damages therefor Melanie seeks herein the relief elsewhere sought in this Answer. (Notwithstanding the foregoing, it is the position of the defendants that the purported Order of Attachment and purported levies thereunder are void and of no force or effect for any and all purposes.)

WHEREFORE, defendants demand judgment as follows:

(1) The Complaint be dismissed, with costs and disbursements of the action, including counsel fees;

(2) Judgment in favor of Melanie for a full and complete accounting for and payment of all royalties under the Songwriter's Agreement and $1,000,000 punitive damages be entered, with interest, against Kama Rippa on the first counterclaim against Kama Rippa;

(3) That this Court issue a declaratory judgment that all rights in and to all musical compositions delivered to plaintiff by Melanie have reverted to Melanie, throughout the world in their entirety, and that this Court order that all documents, files, copyright certificates, copies of sub-publishing agreements and license agreements of every type and nature affecting and relating to said compositions be delivered forthwith to Melanie, on the second counterclaim against Kama Rippa;

(4) That a mandatory injunction issue, perpetually restraining and enjoining Kama Rippa, its deputies, agents, employees, and other persons in concert or participation, from holding itself out as having any interest whatsoever in musical compositions previously delivered by Melanie to Kama Rippa, or from collecting or receiving any moneys in connection with or with respect to said musical compositions, on the third counterclaim against Kama Rippa;

(5) Judgment in favor of the defendants for a full and complete accounting for and payment of all royalties under the Co-Publishing Agreement and $1,000,000 punitive damages be entered, with interest, against Kama Rippa and Kama Sutra on the fourth counterclaim against Kama Rippa and first claim against Kama Sutra;

(6) Judgment in favor of the defendants in the sum of $5,000,000 compensatory damages and $1,000,000 punitive damages be entered, with interest, against Buddah on the first claim against Buddah;

(7) Judgment in favor of Melanie in the sum of $5,000,000 compensatory damages and $1,000,000 punitive damages be entered, with interest, against Buddah on the second claim against Buddah;

(8) Judgment in favor of Melanie in the sum of $5,000,000 compensatory damages and $1,000,000 punitive damages be entered, with interest, against Buddah on the third claim against Buddah;

(9) Judgment in favor of each of the defendants in the sum of $1,000,000 be entered, with interest, against Buddah on the fourth claim against Buddah;

(10) Judgment in favor of the defendants for a full and complete accounting for and payment of all royalties under the Artist Recording Agreement and Producer's Agreement and $1,000,000 punitive damages be entered, with interest, against Buddah on the fifth claim against Buddah;

(11) Judgment in favor of Melanie in the sum of $5,000,000 compensatory damages and $1,000,000 punitive damages be entered, with interest, against Buddah on the sixth claim against Buddah;

(12) That a mandatory injunction issue, perpetually restraining and enjoining Buddah, its deputies, agents, employees, representatives, and other persons in concert or participation, from releasing to the record-buying public phonograph recordings containing musical performances by Melanie which were not released by Buddah prior to May 14, 1971, and that an order issue directing Buddah to cause to be removed from all outlets and channels of sale and distribution all phonograph recordings above-described heretofore released and to pay to defendants all gains and profits derived by plaintiff resulting from distributions and sales heretofore made to the record-buying public for or with respect to the above-described phonograph recordings, on the seventh claim against Buddah;

(13) That a mandatory injunction issue, perpetually restraining and enjoining Buddah, its deputies, agents, employees, representatives, and other persons in concert or participation, from offering for sale L.P. recordings containing songs recorded by Melanie and released prior to May 14, 1971, except insofar as said L.P. recordings are offered for sale in the same recorded form and packaging as they were originally released for sale at the time of their initial release, and that an order issue directing Buddah to cause to be removed from all outlets and channels of sale and distribution all L.P. recordings containing songs recorded by Melanie and released subsequent to May 14, 1971, to the extent that said L.P. recordings are not offered for sale in the same recorded form and packaging as they were originally released and offered for sale at the time of their initial release, and to pay to defendants all gains and profits derived by plaintiff from all previous distributions and sales not in accordance with the above, on the eighth claim against Buddah;

(14) Judgment in favor of the defendants in the sum of $50,000 compensatory damages and $1,000,000 punitive damages be entered, with interest, against Kama Rippa on the fifth counterclaim against Kama Rippa;

(15) Judgment in favor of the defendants and against Kama Rippa in an amount and/or in such form as may be just, proper, and appropriate be entered on the sixth counterclaim against Kama Rippa;

and for such other, further, and different relief as to this Court may seem just and proper.

SANDOR FRANKEL
Attorney for Defendants-Counterclaimants
Office & P. O. Address
225 Broadway
New York, New York 10007
(212) 227-6000

SONGWRITER'S AGREEMENT

195A

Agreement made as of this 31st day of May, 1968 by and between KAMA RIPPA MUSIC, INC., a New York Corporation, whose address is 1650 Broadway, New York, New York, and AMELANIE MUSIC, a New York Corporation, c/o Howard Beldock, Esq., 720 Fifth Avenue, New York, New York, (hereinafter jointly called "Publisher") and MELANIE SAFKA, whose address is c/o Howard Beldock, Esq., 720 Fifth Avenue, New York, New York, (hereinafter called the "Writer").

W I T N E S S E T H

In consideration of the sum of Ten ($10.00) Dollars, paid in hand by Publisher to Writer, and the mutual promises herein contained and other good and valuable consideration, receipt of which is hereby acknowledged, the Writer and Publisher agree as follows:

1. The Writer is hereby engaged and employed by the Publisher, and accepts such engagement and employment, as to furnish exclusive services as an exclusive songwriter for the Publisher, with respect to all musical works and arrangements hereinafter more fully described (except as specifically excluded below), and the Writer hereby irrevocably sells, assigns, transfers and delivers to the Publisher, its successors and assigns, all musical works and arrangements of musical works in the public domain (hereinafter called "Compositions") (except those musical compositions controlled by other publishing companies as set forth in Schedule "A" annexed at the end of the agreement), which have been prior to the date hereof, written, composed, created or conceived in whole or in part by the Writer, and which may hereafter during the term hereof, which shall be for a period of two (2) years from the date of this agreement, be written, composed, created or conceived by the Writer in whole or in part, and with respect to any collaboration by Writer, Paragraph 3 hereafter sets forth shall govern, and which are now owned or controlled and may hereafter during the term hereof, be owned or controlled, directly or indirectly, by the Writer as employer, transferee or otherwise including the title, words and music and all copyrights thereof, and all rights of whatsoever nature and hereafter thereunder existing and/or existing under any agreements or licenses relating thereto, for and during the full initial term of all said copyrights (as same is presently or may hereinafter be defined, but in all circumstances for a period of twenty-eight (28) years from the date of publication in the United States) and the Writer hereby sells, assigns, transfers and delivers to the Publisher, its successors and assigns the copyrights of said musical compositions and the registration thereof, and all rights of any and every nature now and hereafter thereunder existing, for the full initial term of said copyright as qualified above. The compositions referred to in Paragraph 1 hereof are hereinafter jointly and severally referred to as the "compositions". XX

2. (A) The Writer hereby warrants and represents that the said compositions are and shall be Writer's sole and exclusive work, written and/or composed independent of any employer for hire and not subject to any exclusive songwriter-publisher agreement, that no other person, firm or corporation whatsoever has any right, title or interest in and to the same or any mortgage, lien or other encumbrance upon the same or any license of any kind whatsoever relating to the same, and that Writer has the full and unrestricted right, power and authority to make the within agreement and grant the rights hereunder granted to the Publisher. MM

** It is expressly agreed that all renewal rights are excluded hereunder.

Ex. 2

(B) The Writer hereby warrants and represents that the said compositions are and shall be new and original, are copyrightable in all respects and do not infringe upon the rights of any party in any other work, or otherwise.

(C) The Writer agrees to indemnify, save and hold Publisher harmless from and against any and all loss, damage and/or expense including reasonable attorney's fees arising out of or connected with any claims or demands by any third parties which are

Rider to Paragraph 2(C) of Agreement dated as of May 31, 1968

Publisher (meaning Kama Sutra Music Inc.) may, at its election request Writer to furnish Publisher with a surety company bond for the amount of any claim or demand made by a third party with respect to the subject matter of this Agreement, and if Writer fails to do so within five (5) days after Publisher's giving notice of claim to Writer (as provided in Paragraph 10(A) below) and demand for surety bond from Writer, Publisher may, in addition to any other rights and remedies Publisher may have, suspend all payments to be made pursuant to this Agreement and hold such payments in escrow pending resolution of any such third party claim or demand.

4. The Publisher agrees to pay the Writer during the original and renewal and extended term of copyright in the said compositions throughout the world, the following royalties:

(A) No Dollars as a non-returnable advance against the royalties payable to Writer(s) hereunder, which sum, and all other advances which may be paid, shall be deductible from payments hereafter becoming due the Writer(s) hereunder or under any other agreement heretofore or hereafter made between the parties.

(B) Five (.05) cents per copy, for each and every regular piano copy thereof published and sold by and paid for to the Publisher in the United States and Canada.

Ten (.10) cents per copy, for each and every dance orchestration thereof published and sold by and paid for to the publisher in the United States and Canada.

(C) Ten (10%) percent of the wholesale selling price (after trade discounts if any) for each and every printed copy of each and every other arrangement and edition thereof published and sold by and paid for to the Publisher in the United States and Canada, except that in the event the said work shall be used or caused to be used whole or in part in conjunction with one or more other musical compositions in a folio or album, the Writer(s) shall be entitled to receive that proportion of Ten (10%) percent which the musical composition shall bear to the total number of musical compositions contained in such folio or album, but in no event shall Writer(s) be entitled to receive more than $12.50 for each edition of lyrics only allowed.

(D) Fifty (50%) percent of any and all net sums actually received by the Publisher from the mechanical rights, electrical transcription and reproducing rights, motion picture synchronization and television rights, and all other rights (except as otherwise specifically provided for herein) therein in the United States and Canada, except that the Writer(s) shall not be entitled to share in any sum or sums received by the Publisher from ASCAP or BMI or any public performance rights organization which pays performance fees directly to songwriters.

(E) Fifty (50%) percent of any and all net sums earned and actually received by the Publisher from sales and uses (other than public performances uses for which Writer(s) are paid by any public performance rights organization of the musical compositions in countries outside of the United States and Canada.

(F) The Publisher shall not be required to pay any royalties on professional or complimentary copies or any copies which are distributed gratuitously to performing Artists or orchestral leaders or for advertising or exploitation purposes.

(G) The Publisher shall not be required to pay royalties earned by reason of the public performance of the musical composition, said royalties being payable only by the performing rights society with which Writer(s) is or may in the future become affiliated.

(H) Except as is specifically provided for in the subdivisions of this Paragraph 4, there shall be no other royalties payable by Publisher to Writer.

5. The Writer acknowledges that included within the rights hereinabove referred to is the irrevocable grant to the Publisher, its successors, licensees, sub-licensees and assigns, of the sole and exclusive right, license, privilege and authority throughout the entire world with respect to the said original musical compositions and original arrangements or compositions in the public domain, as follows:

(A) To perform said musical compositions publicly for profit by means of public and private performance, radio broadcasting, television, facsimile, or any and all other means, whether now known or which may hereafter come into existence.

(B) To substitute a new title or titles for said works and to make any arrangment, adaptation, translation, dramatization and transposition of said works, in whole or in part, and any additions to and deletions from said works and in connection with any other musical, literary or dramatic material as Publisher may deem expedient or desirable, and in this connection Writer hereby waives all rights of "droit moral".

(C) To secure copyright registration and protection of said works throughout the world at Publisher's own costs and expense and at Publisher's election, and to have and to hold said copyrights and all rights whatsoever thereunder existing, for and during the full initial term of all said copyrights as qualified in Paragraph 1 above.

(D) To make or cause to made master records, transcriptions, sound tracks, pressings and any other mechanical, electrical or other reproductions of said compositions in whole or in part in such form or manner and as frequently as Publisher in its sole and uncontrolled discretion shall determine, including the rights to synchronize the same with sound motion pictures and the right to manufacture, advertise, license or sell such reproductions for any and all purposes, including but not limited to private performances and public performances, by broadcasting, television, sound motion pictures, wired radio and any and all other means or devices whether now known or which may hereafter come into existence.

(E) To print, publish and sell sheet music, orchestrations and arrangements of the compositions in all forms, including the rights to include any or all of the said works in song folios or lyric magazines with or without music and the right to license others to include any or all of the compositions in song folios or lyric magazines with or without music.

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(F) Any and all other rights of every and any nature now or hereafter existing under and by virtue of any common law rights and/or any copyrights in the compositions or any portions thereof.

6. The Publisher agrees to render to the Writer on or about each August 15th covering the six (6) months ending June 30th and each February 15th covering the six (6) months ending December 31st, royalty statements showing the amount of compensation due to the undersigned hereunder, accompanied by remittance for any royalties shown to be due the undersigned by said statement. All such compositions, statements and

Rider to Paragraph 6 of the Agreement dated as of May 31, 1968

The payment of royalties when due are of the essence. Accordingly, if Publisher fails to account and pay royalties in accordance with this Paragraph and such failure and default continues following thirty (30) days written notice of such failure and default, this agreement shall terminate and all rights in and to the compositions theretofore covered shall revert to the Writer. This provision may be specifically enforced. However, notwithstanding anything to the contrary above, if performance of Publisher's obligation under this Agreement is delayed or becomes impossible or impractical by reason of any act of God, fire, earthquake, strike, labor disturbance, civil commotion, acts of government, its agencies or officers, any order, war (whether or not officially declared) regulation, ruling or action of any labor union or association of composers or employees affecting Publisher or the industry in which it is engaged or delays in the delivery of material and supplies, or for any similar or dissimilar reason Publisher may, upon notice to Writers, suspends its obligations including its obligations to make payments hereunder for the duration of such delay, impossibility, impractability, as the case may be.

rights in the United States in said composition, provided that the Publisher shall pay the Writer the royalties herein stipulated.

8. All of the foregoing royalties shall apply in instances where the Writer is the sole author of the entire composition including the music and words thereof. In the event that the Writer has a collaborator on any work or works included in this Agreement, then the foregoing royalties shall be divided equally between the Writer and collaborator(s) of such compositions (unless otherwise agreed among the collaborators). Except as herein expressly provided for, no royalties shall be paid with respect to the said Compositions.

9. The Writer hereby consents to such changes, adaptations, dramatization, transpositions, editing and arrangements of said composition, and the setting or words to the music and of music to the words, and the change of the title as the Publisher deems desirable. In the event that the said composition is an instrumental composition, then and in such event, the Writer hereby irrevocably grants to the Publisher the sole and exclusive right and privilege to cause to have lyrics written for said compositions by a writer or writers designated by the Publisher, which lyrics shall require only the approval of Publisher, whereupon the Writer shall be entitled only to one-half (½) of the aforementioned royalties provided in this agreement. The Writer hereby waives any and all claims which he has or may have against the Publisher and/or its associated, affiliated, parent and subsidiary corporations or firms by reason of the fact that the title of said compositions may be the same or similar to that of any musical compositions heretofore or herafter acquired by the Publisher and/or its associated, affiliated, parent and subsidiary corporations or firms. The Writer consents to the use of Writer's name, likeness and/or the title to the said compositions on and in connection with music, folios, recordings, performances, player rolls and in connection with publicity and advertising concerning the Publisher, its successors, assigns and licensees, and said compositions, agrees that the use of such name, likeness and/or title may commence prior to publication and may continue so long as the Publisher shall own and/or exercise any rights in the said compositions.

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10. Any legal action brought by the Publisher against any alleged infringer of said compositions shall be initiated and prosecuted at the Publisher's sole expense; and, of any recovery made by it as a result thereof, after deduction of the expense of litigation, a sum equal to fifty (50%) percent shall be paid to the Writer.

(A) If a claim is presented against the Publisher in respect of said compositions and as a result thereof the Publisher is jeopardized, it shall thereupon serve written notice upon the Writer, containing the details of such claim known to the Publisher, and thereafter, until the claim has been adjudicated or settled, Publisher shall hold payment of any monies coming due the Writer under this or any other agreement in abeyance pending the outcome of such claim or claims. The Publisher shall have the right to settle or otherwise dispose of such claims in any manner as it in its sole discretion may determine.* In the event of any recovery against the Publisher, either by way of judgment, court decree, arbitration award, settlement or otherwise, the amount thereof and all of the costs, charges, disbursements and attorney's fees in connection therewith may be deducted by the Publisher from any and all royalties or other payments theretofore or thereafter payable to the Writer by the Publisher under this or any other agreement, or by its associated, affiliated, parent or subsidiary firms or corporation.

(B) From and after the service of a summons in a suit for infringement filed against the Publisher with respect to any of said compositions, any and all payments thereafter coming due the Writer shall be held by the Publisher in abeyance until the suit has been finally adjudicated or settled, and same shall then be disbursed accordingly, unless the Writer shall elect to file an acceptable bond in the sum of such payments, in which case the sums shall be paid to the Writer.

Written demands and notices other than royalty statements provided for in this agreement shall be sent by registered or certified mail, Return Receipt Requested, or by telegram or cablegram, or shall be given personal delivery, at the addresses first above written or such other addresses as the Publisher and Writer may from time to time advise each other.

11. The Writer hereby irrevocably constitutes and appoints the Publisher and/or any of its officers, directors or agents or the Publisher's nominee his attorney-in-fact to make, sign, acknowledge, execute and deliver in the name of the Writer or in the name of the Publisher, its successors, licensees and/or assigns any and all instruments and documents necessary or desirable to effect the intent of this agreement and vest in the Publisher, its successors, assigns and licensees any and/or all of the rights referred to in this agreement.

12. The Writer hereby acknowledges that Writer's services as a Writer and/or a composer are unique, exceptional and extraordinary and that in the event of any breach by the Writer of any of Writer's undertakings or obligations under this agreement, the Publisher shall be entitled to an injunction to enforce the same in addition to any other remedies available to Publisher. It is further specifically understood and agreed that this agreement is for the personal services of the Writer, and that the obligations of the Writer hereunder shall not in any event be dischargeable in bankruptcy or insolvency proceedings involving the Writer or in any wise affected thereby.

13. The Writer agrees that during the term of this agreement and any extensions thereof, Writer will not consent to or permit the use of Writer's name as the author and/or composer of any musical composition of which Writer is not the actual or co-author or composer or co-composer, unless said composition or compositions is published or owned by the Publisher. The Writer agrees that Writer will not write or compose any compositions under any name other than Writer's own name.

* , but all such settlements shall be subject to Writer's prior consent, which shall not be unreasonably withheld.

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14. Immediately upon the completion or acquisition of any compositions as defined in Paragraph 1 hereof, the Writer will deliver to the Publisher a manuscript copy of said compositions and agrees that during the term of this agreement and any extension thereof Writer will deliver to the Publisher a minimum of twenty (20)

Rider to Paragraph 14 of Agreement dated as of May 31, 1968

Each composition of a duration longer than three (3) minutes thirty (30) seconds shall be considered two (2) compositions.

15. The Writer warrants and represents that Writer is affiliated or intends to affiliate with ASCAP.

16. The term of this agreement shall be for a period of two (2) years commencing May 31, 1968 and ending May 31, 1970. Publisher shall have the right, upon giving written notice at least thirty (30) days prior to the end of the term hereof ~~or any renewal term, as the case may be~~, to extend this agreement for one (1) further period of one (1) year, commencing May 31, 1970 upon the same terms and conditions as contained herein. ~~Each option may be exercised separately~~. Notice shall be deemed given as of the date of mailing, telegram or cablegram.

17. In the event that this agreement is signed by more than one individual as Writer, this agreement shall be considered as the joint agreement of all said individuals as Writers and as the individual agreement of each of said individual Writers with the same force and effect as if each of them had entered into separate agreements embodying all of the provisions hereof and this agreement shall be so read and construed notwithstanding any language to the contrary or inconsistent therewith. In such event the royalties in all songs written by said individuals as writers under this Agreement shall be divided equally between them.

18. This agreement shall be binding upon and shall insure to the benefit of the respective parties hereto, their respective successors in interest, heirs, next of kin, legal representatives and assigns, and represents the entire understanding of the parties.

19. This Agreement sets forth the entire understanding between the parties with respect to the subject matter thereof, and no modification, ammendment, waiver, termination or discharge of this Agreement or any provisions thereof, shall be binding upon either party unless confirmed by a written instrument signed by an officer of Publisher and Writer. No waiver of any provision of or default under this Agreement shall effect either party's rights thereafter to enforce such provision or to exercise any right or remedy in the event of any other default whether or not similar. This Agreement and all of its provisions shall be interpreted and construed everywhere in accordance with the Laws of the State of New York, applicable to contracts executed and to be performed herein.

If the foregoing accords with your understanding, as it does with ours, kindly sign in the space provided underneath the words, "Accepted and Agreed To".

Very truly yours,

Amelanie Music

By _____

Kama Rippa Music, Inc.

By _____

Accepted & Agreed To:

_____

The Kama Sutra Group
BUDDAH RECORDS, INC. / KAMA-SUTRA RECORDS, INC.
BUDDAH MUSIC, INC. / TENDER-TUNES MUSIC CO., INC. / KAMA-SUTRA MUSIC CO., INC. / KAMA-RIPPA MUSIC, INC.
1650 BROADWAY, NEW YORK, NEW YORK, 10019 / PHONE (212) 582-6900

August 24, 1971

Ms. Melanie Schekeryk,
Mr. Peter Schekeryk, and
Amelanie Music
c/o Robert Casper, Esq.
1780 Broadway
New York, New York 10019

Dear Melanie and Peter:

Reference is hereby made to our Co-Publishing Agreement of May 31, 1968 and our Exclusive Songwriters Agreement of May 31, 1968:

In connection therewith, we hereby agree that the delivery of a total of twenty (20) musical compositions wholly written by Melanie Schekeryk to us under and pursuant to a Songwriters and Co-Publishing Agreement aforesaid, and as an addition to musical compositions previously delivered by Melanie Schekeryk to Kama Rippa Music, Inc., shall satisfy the delivery requirements with respect to compositions written by Melanie Schekeryk.

We hereby accept the said twenty (20) compositions in full and complete satisfaction of Melanie Schekeryk's remaining obligations under the Songwriters Agreement and the Co-Publishing Agreement and any and all extensions of said Agreements.

You agree to deliver to us lead sheets and lyrics for the aforesaid compositions and cooperate with us in connection with our taking necessary steps to copyright and protect same.

Melanie Schekeryk hereby agrees to record, within two (2) years from the date of this Agreement, not less than three (3) of the said twenty (20) musical compositions to be delivered hereunder.

The Kama Sutra Group
BUDDAH MUSIC, INC. / TENDER-TUNES MUSIC CO., INC. / KAMA-SUTRA MUSIC CO., INC. / KAMA-RIPPA MUSIC, IN
BUDDAH RECORDS, INC. / KAMA-SUTRA RECORDS, IN
1650 BROADWAY, NEW YORK, NEW YORK, 10019 / PHONE (212) 582-350

If in the event Melanie Schekeryk does not record three (3) of the said twenty (20) musical compositions, pursuant to the paragraph aforesaid, then for each recording she fails to make, Melanie Schekeryk agrees to pay Twenty-Five Thousand ($25,000) Dollars to Kama Rippa Music, Inc., or its designee or assignee, or a total of Seventy-Five Thousand ($75,000) Dollars if she records none of the twenty (20) musical compositions in accordance with the paragraph aforesaid, as liquidated damages. Kama Rippa Music, Inc. agrees to accept such liquidated damages as full compensation and the sole remedy for any failure by Melanie Schekeryk to record musical compositions in accordance with the provisions of this Agreement.

With respect to each of the aforesaid musical compositions, Melanie Schekeryk and Amelanie Music shall retain all rights granted to each of them pursuant to the Songwriters Agreement and the Co-Publishing Agreement aforesaid, including, without limitation, any causes of action or counterclaims that they may have arising out of same.

Kama Rippa Music, Inc. agrees to issue whatever mechanical licenses are required for mechanical reproduction by record companies of the aforesaid twenty (20) musical compositions.

You and we expressly agree and understand that no press release or public statement, with respect to any matter contained in this Letter Agreement, shall be made by any party hereto except as may be mutually agreed to in writing by you and us.

This Agreement and all rights and obligations of the parties hereunder shall be construed and enforced under the laws of the State of New York, United States of America, where this Agreement has been or is being deemed made.

The Kama Sutra Group BUDDAH RECORDS, INC./ KAMA-SUTRA RECORDS, INC.
BUDDAH MUSIC, INC. / TENDER-TUNES MUSIC CO., INC. / KAMA-SUTRA MUSIC CO., INC. / KAMA-RIPPA MUSIC, INC.
1650 BROADWAY, NEW YORK, NEW YORK, 10019 / PHONE (212) 582-6900

This Agreement cannot be modified, changed or discharged except by writing duly executed by the parties hereto with the same formality as this Agreement. No waiver by any party hereto, whether express or implied, of any provisions of this Agreement or of any breach or default of any party, shall constitute a continuing waiver of such provisions or of a waiver of any other provision or provisions of this Agreement and no such waiver by any party shall prevent such party from enforcing any and all provisions of this Agreement, or from acting upon any subsequent breach or default of any other party, under any provisions of this Agreement.

If the foregoing reflects your understanding, as it does ours, kindly signify your acceptance by signing beneath the words, "Accepted and Agreed To".

Very truly yours,

KAMA RIPPA MUSIC, INC.

By Arthur Kass
ARTHUR KASS

ACCEPTED & AGREED TO:

AMELANIE MUSIC

By Melanie Schekeryk
Peter Schekeryk

By Melanie Schekeryk
MELANIE SCHEKERYK

By Peter Schekeryk
PETER SCHEKERYK

EXHIBIT 4

The following are the musical compositions of Melanie Schekeryk delivered to Kama Rippa Music, Inc.:

Again
Any Guy
Babe Rainbow
Baby Guitar
Birthday of the Sun
Candles in the Rain
Citiest People
Deep Down Low
For My Father
Good Book
The Good Guys
I Don't Eat Animals
Isn't It a Pity
Johnny Boy
Lay Down
Leftover Wine
Lovin' Baby Girl
My Beautiful People
Nickel Song
On the Way Down
Peace Will Come
The Prize
The Saddest Thing
Take Me Home
Tuning My Guitar
Uptown Down
What Have They Done to My Song, Ma
You Can Go Fishing
Beautiful People
Garden in the City
God's Only Daughter
Don't You Wait by the Water
Animal Crackers
Ask Me Again
Psychotherapy
Close It All Down
Carolina In My Mind
I Really Loved Harold
I'm Back in Town
In the Hour
Happy Birthday
Merry Christmas
Momma Momma
Walk the World
Why Didn't Mother Tell Me
All the Right Noises
Please Love Me
Another Side of Melanie
Birthday of the Rain
Bobo's Party
Close to It All
Do You Wait by the Water
Ears to the Ground
Jigsaw Puzzle
My Bonnie Lies Over
Pebbles in the Sand
Please Love Me
People in the Front Row
Save the Night
Getting Out
Chords of Fame
Stop I Don't Want to Hear It Any More
Love in My Mind
We Don't Know Where We're Going
Sign in the Window
Nobody Wants to Take You Home
If I Go
Love is My Shadow
I'm Not the Kind
The Morning
As I Went Walking
Sing All My Sorrows
Flatlands of Holland
This Time
Singing for Jason
Hey, You People
I'm the Girl Who Rides
Pudding Road
I Almost Forgot
Moonbeam
Brother, Oh Brother
Restless Wind
Graveyard
A Curse or A Joy
Let Him See You Smile

Ex 4

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐ Show to whom, date and address where delivered

☐ Deliver ONLY to addressee

RECEIPT

Received the numbered article described below

REGISTERED NO. 529661

CERTIFIED NO.

INSURED NO.

DATE DELIVERED 8-21-73

(1) SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

(2) SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

(3) SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

REGISTERED NO. 529661

205A

Value $ N.V		Special Delivery $	
Reg. Fee $ 95		Return Receipt $ 11	
Handling Charge $		Restricted Delivery $	
Postage $ 8		☐ AIRMAIL	
POSTMASTER (By)			

POSTMARK OF DELIVERING POST OFFICE

AUG 21 1973

MAILING OFFICE

FROM Owner Vessel of Australia
50 W 57th St NY

TO Kenny Ruffin Mason
810 Seventh Ave
NYC

Exhibit

August 23, 1973

Kama Rippa Music, Inc.
Kama Sutra Music, Inc.
810 Seventh Avenue
New York, New York 10019

Gentlemen:

Your failure to remit timely royalty payments to AGAC on behalf of our member, Melanie Safka, constitutes a material breach of your agreement with her.

Your retention of copyrights is placed in jeopardy failing immediate payment with interest at 6% from due date of payment (August 15th).

Very truly yours,

Lewis M. Bachman

LMB:of
cc: Peter Thal, Esq.
REGISTERED MAIL
RETURN RECEIPT REQUESTED

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At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House in the City of New York, on the 26th day of September, 1973

P R E S E N T:

HONORABLE [illegible]

Justice

- - - - - - - - - - - - - - - - - - - -x

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

- - - - - - - - - - - - - - - - - - - -x

ORDER TO SHOW CAUSE ON MOTION TO VACATE ORDER OF ATTACHMENT AND LEVIES THEREUNDER

Index No. 16516/73

Upon the order of attachment of property of the defendants herein granted on or about September 18, 1973, and on the papers on which the said Order of Attachment was granted (the annexed affidavit of Harley I. Lewin of plaintiff's counsel, sworn to September 17, 1973, with exhibits), and on the motion of Sandor Frankel, the attorney for the defendants, let the plaintiff and John J. McCloskey, Sheriff of New York County, show cause before this Court at a Special Term, Part I thereof, to be held at the County Court House, City of New York, on the 2nd day of September, 1973, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be granted vacating the said Order of Attachment and setting aside any and all levies made there-

under, on the grounds that (1) plaintiff is guilty of bad faith in obtaining the Order of Attachment, (2) this Court does not have jurisdiction of this action, (3) plaintiff is guilty of abuse of this Court's processes in obtaining the Order of Attachment, (4) defendants' valid claims against plaintiff preclude the granting of an Order of Attachment, (5) no grounds for an Order of Attachment exist under CPLR §6201, (6) plaintiff's Complaint is, prima facie, legally insufficient to support an Order of Attachment, and (7) the ex parte Order of Attachment was obtained by plaintiff's recourse to unconstitutional means, and for such other and further relief as may be proper, including full damages, together with the costs of this motion and counsel fees.

An order to show cause is sought because of the danger of prejudice to defendants herein by delay (as described more fully in the accompanying affidavit of Sandor Frankel), if deponent should proceed by usual notice of motion.

No prior motion has been made for the same or similar relief.

Sufficient cause appearing therefor, it is further ordered that service of a copy of this order and the annexed affidavit (with exhibits) upon the plaintiff's attorney, Emil Kobrin, Klein & Garbus, and upon John J. McCloskey, the Sheriff of New York County, on or before September 27 1973, shall be sufficient service thereof.

Enter.

/s/

J. S. C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- 209A

- x

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

- x

AFFIRMATION IN SUPPORT OF MOTION TO VACATE ORDER OF ATTACHMENT AND LEVIES THEREUNDER

Index No. 16516/73

The undersigned, Sandor Frankel, attorney for defendants, affirms that the following statement is true, under penalty of perjury:

1. I am the attorney for the defendants herein and am fully familiar with all of the proceedings had herein.

2. An Order of Attachment obtained by plaintiff in an ex parte application to the Hon. Wilfred A. Waltemade, at a Special Term, Part II, of this Court, was obtained herein against the property of the above-named defendants on the 18th day of September, 1973. Said Order of Attachment was delivered on the 19th day of September 1973, to the Sheriff of New York County for levy thereunder. Said Sheriff claims that by virtue of said Order of Attachment, he levied upon and seized the following described property of the defendants, on the 19th day of September, 1973:

"the monies now in the hands of RAMA RIPPA MUSIC, INC. [the plaintiff herein], 810 Seventh Avenue, New York, New York and the offices of Robert L. Casper, P.C., 1780 Broadway, New York, New York, in which said Defendants MELANIE and PETER SCHEKERYK and AMELANIE MUSIC, INC., have an interest and upon such debts owed to said Defendants as will satisfy Plaintiff's demand of $75,000.00 together with probable interest, costs and Sheriff's fees and expenses."

A copy of said Order of Attachment and the Sheriff's levy are annexed hereto collectively as Exhibit A. A copy of plaintiff's papers upon which said Order of Attachment was granted and levy served--consisting of an affidavit of plaintiff's counsel, with exhibits--is annexed hereto as Exhibit B.

PRIOR PROCEEDINGS

3. In obtaining the Order of Attachment, the moving affidavit of plaintiff's counsel misstated and deliberately concealed from the Court the history and pendency of prior and pending proceedings between these parties in this Court and in the United States District Court for the Southern District of New York.

4. Defendant Melanie Schekeryk (hereinafter "Melanie", the name used professionally) is a professional songwriter, singer, musician, and entertainer. Defendant Peter Schekeryk is her husband and her professional manager. Defendant Amelanie Music is a publishing company jointly owned by Melanie and Peter Schekeryk, through which they publish musical compositions written by Melanie.

5. On or about May 31, 1968, a "Songwriter's Agreement" was entered into between plaintiff and Amelanie Music (jointly described in said Agreement as "Publisher") and Melanie. (A copy of the Songwriter's Agreement is annexed hereto as Exhibit C.) On or about October 28, 1968, an "Artist Recording Agreement" was entered into between Melanie and Buddah Records, Inc., an affiliate of plaintiff. (A copy of the Artist Recording Agreement is annexed hereto as Exhibit D.) Under the Songwriter's Agreement, Melanie agreed to furnish musical compositions to plaintiff. Under the Artist Recording Agreement, Melanie agreed to furnish to Buddah Records, Inc. recordings of her singing performances for public release. Melanie entered into these two separate agreements with different parties--Kama Rippa Music, Inc. and Buddah Records, Inc.--and the two agreements were, as the terms clearly indicate, separate and distinct agreements.

6. On or about January 27, 1971, plaintiff herein and Buddah Records, Inc. commenced an action against these defendants in this Court, entitled Buddah Records, Inc., Kama Rippa Music, Inc., et al. v. Paramount Records, Inc., Amelanie Music, et al. In that action, each of these defendants asserted numerous counterclaims against plaintiff and Buddah Records, Inc. The causes of action asserted by all sides arose out of the Songwriter's Agreement and the Artist Recording Agreement.

7. On or about May 14, 1971, the litigation then

pending was settled in part, as follows: All claims asserted by all parties under the Artist Recording Agreement were fully settled; in connection therewith, Buddah Records, Inc. (the contractual party to the Artist Recording Agreement with Melanie) received from Famous Music Corp. (Melanie's new recording company, and a subsidiary of Gulf & Western Industries, Inc.) the sum of $500,000.00. However, defendants' claims against plaintiff arising out of the Songwriter's Agreement, totaling damages of $2,000,000.00, were not affected by the settlement. Those claims by defendants against plaintiff have remained pending to and including today. (They are included in the third and fourth counterclaims in defendants' "Answer and Counterclaims" duly served in that litigation in 1971 and annexed hereto as Exhibit E.)

8. On or about August 24, 1971, because a dispute between the parties had arisen concerning whether or not Melanie was obligated under the Songwriter's Agreement to provide plaintiff with additional compositions, plaintiff and defendant entered into a contract finally settling the terms of Melanie's remaining obligations, if any, for the delivery of musical compositions under the Songwriter's Agreement. (A copy of that "Settlement Agreement" is annexed hereto as Exhibit F.) The Settlement Agreement did not affect the counterclaims defendants still had (and still have) pending against plaintiff, but merely clarified the remaining obligations, if any, owed by Melanie to plaintiff under the Songwriter's Agreement.

9. In substance, the Settlement Agreement provided that Melanie was obligated to deliver twenty more musical compositions to plaintiff; the affidavit of plaintiff's counsel in support of plaintiff's application for the Order of Attachment admits that the required twenty compositions were in fact delivered to plaintiff (see ¶9 thereof). The Agreement further provided that Melanie was to "record"--but not that she was to "release" to the general public--three of those twenty compositions. Those undistributed recordings could, in turn, be used by the parties to assist in the sale of those compositions to other artists, record companies, etc., in order to commercially develop the value of the copyrights. The contract did not in any manner obligate Melanie to release those recordings for public distribution. In fact, as all parties were aware, Melanie had previously entered into a recording agreement with Famous Music Corp. (a subsidiary of Gulf & Western Industries, Inc.) governing release to the public of her recordings, in conjunction with which plaintiff's affiliate Buddah Records, Inc., had received from Famous Music, Inc. $500,000.00 in connection with the partial settlement of the original litigation referred to above.

10. Under the original Songwriter's Agreement, under the terms of the partial settlement of the State litigation, and under the Settlement Agreement regarding the Songwriter's Agreement, Melanie retained her right to all future royalties and other rights provided for under the terms of the Songwriter's Agreement.

11. On or about August 31, 1973, plaintiff commenced an action in the United States District Court for the Southern District of New York (73 Civ. 3789--hereinafter referred to as "the federal action"). A copy of plaintiff's Complaint in the federal action is annexed hereto as Exhibit G. The federal action bears exactly the same caption as the instant action which plaintiff now seeks to bring in this Court; indeed, the State action which plaintiff now seeks to bring is virtually an in haec verba repetition of the pending federal action. In the federal action, as in this action, plaintiff seeks damages for what plaintiff alleges to be a breach by the defendants of an alleged obligation to release (in addition to the undisputed obligation to record) the three songs recorded by Melanie pursuant to the Settlement Agreement. The pendency of this identical action in the Federal Court, brought by plaintiff itself against these defendants, was deliberately concealed and nowhere mentioned in plaintiff's ex parte application in this Court for the Order of Attachment.

12. The purported State Complaint upon which the instant Order of Attachment is predicated alleges, virtually in haec verba, the same claim by plaintiff against these defendants as that which plaintiff alleges in the federal action, and which is presently pending before the Hon. Whitman Knapp in the United States District Court for the Southern District of New York. Thus, plaintiff, having chosen to

proceed in federal court on its alleged causes of action, has attempted to use the attachment process of this Court by obtaining ex parte an Order of Attachment without informing this Court of the presently pending federal action which plaintiff itself brought.

13. For the above reasons and the reasons more fully detailed below, defendants respectfully submit that this Court should vacate the Order of Attachment and levies thereunder, on the following grounds:

I. Plaintiff is guilty of bad faith in obtaining the Order of Attachment.

II. This Court does not have jurisdiction of this action.

III. Plaintiff is guilty of abuse of this Court's processes in obtaining the Order of Attachment.

IV. Defendants' valid claims against plaintiff preclude the granting of an Order of Attachment.

V. No grounds for an Order of Attachment exist under CPLR §6201.

VI. Plaintiff's Complaint is, prima facie, legally insufficient to support an Order of Attachment.

VII. The ex parte Order of Attachment was obtained by plaintiff's recourse to unconstitutional means.

I. PLAINTIFF IS GUILTY OF BAD FAITH IN OBTAINING THE ORDER OF ATTACHMENT

14. As noted above, the affidavit of plaintiff's counsel in support of the ex parte application for an Order of Attachment concealed from the Court the identical federal

action brought by plaintiff against these defendants and presently pending before the Hon. Whitman Knapp in the United States District Court for the Southern District of New York. The affidavit of plaintiff's counsel further misinformed the Court by alleging that the initial litigation between the parties (commenced in 1971) had been settled and that defendants have no counterclaims against plaintiff over and above the amount now sought by plaintiff; in fact, that litigation was only partially settled, and claims totaling $2,000,000.00 asserted by these defendants against this plaintiff are now pending in that action.

15. Defendants respectfully submit that plaintiff's deliberate and wilful failure to accurately inform the Court of the true posture of pending litigations between the parties is an exercise of bad faith so eggregious as to warrant, without more, this Court vacating the Order of Attachment and levies thereunder. In addition, there are, as hereinafter described, numerous other substantial grounds for vacating the Order and levies.

II. THIS COURT DOES NOT HAVE JURISDICTION OF THIS ACTION

16. As stated above, the State-Court action upon which the Order of Attachment was predicated is merely a verbatim duplication of the same action brought by plaintiff in the Federal Court and still pending in the Federal Court before the Hon. Whitman Knapp. (On information and belief, plaintiff has not even attempted to serve this State-Court

Complaint upon defendants, who are and have always been available for service; it is apparent that the State-Court Complaint was prepared for the sole purpose of providing a vehicle for plaintiff's application for an Order of Attachment in this Court). Plaintiff's moving papers in support of its ex parte application for the Order of Attachment deliberately concealed this fact from the issuing Court, misrepresenting that "no previous application for this relief has been made to any court or judge" (see ¶20 of affidavit of plaintiff's counsel, annexed to Exhibit B herein). Defendants respectfully submit that this concealment was tantamount to an acknowledgement by plaintiff that this Court is without jurisdiction.

17. It is hornbook law that,

> "Where a state and a federal court have concurrent jurisdiction over the same parties or privies to the same subject matter, the tribunal where jurisdiction first attaches retains it exclusively, and should be left to determine the controversy and to fully perform and exhaust its jurisdiction and to decide every issue or question properly arising in the case. This jurisdiction continues until the judgment rendered in the first action is satisfied and extends to proceedings which are ancillary or incidental to the action first brought." 21 Corpus Juris Secundum, Courts, §529.

More particularly,

> "A party who invokes the jurisdiction of either of such courts, where they have concurrent jurisdiction, is bound by his election, and cannot thereafter bring an action in the other tribunal, unless the later suit involves questions which cannot be considered in the earlier." 21 Corpus Juris Secundum, Courts, §527.

18. It is settled law that where a party's action is pending in federal court, he may not subsequently commence the same cause of action in a New York State court; the New York State courts have held that under these circumstances, they are without jurisdiction. See, e.g., Fire Ass'n of Philadelphia v. General Handkerchief Corp., 304 N.Y. 382 (1952); Delli v. Luckenbach Steamship Co., Inc., 154 N.Y.S.2d 137 (Sup.Ct. 1956).

III. PLAINTIFF IS GUILTY OF ABUSE OF THIS COURT'S PROCESSES IN OBTAINING THE ORDER OF ATTACHMENT

19. It will no doubt appear to this Court as a strange curiosity that the Order of Attachment which plaintiff sought and obtained ex parte was levied upon, and was intended to be levied upon, plaintiff itself.* By the terms of the Order, the Sheriff is directed to "levy within the jurisdiction . . . upon the monies now in the hands of KAMA RIPPA MUSIC, INC."--the very plaintiff in this purported State action. Defendants respectfully submit that the rationale underlying the extreme remedy of an ex parte attachment of property does not extend to or permit a party to levy against property held by

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* The only other party named in the Order of Attachment is Robert Casper, P. C. Robert Casper, Esq., an attorney at law, is general counsel to the defendants and a member in good standing of the Bar of this State. He has informed deponent that he holds no money, notes, bonds, checks, or other instruments payable to the defendants, and that he owes them no financial debt. The practical effect of the Order of Attachment and levies is therefore limited to the effect, if any, on plaintiff itself.

itself, and that plaintiff proceeded in bad faith in securing such order and levies.

20. The motive behind plaintiff's abuse of the process is clear. Under the terms of plaintiff's Songwriter's Agreement with Melanie, plaintiff is required to deliver to Melanie

> "on or about each August 15th covering the six months ending June 30th . . . royalty statements showing the amount of compensation due to [Melanie] accompanied by remittance for any [such] royalties . . . . If publisher fails to account and pay royalties in accordance with this paragraph and such failure and default continues following thirty (30) days written notice of such failure and default, this agreement shall terminate and all rights in and to the compositions theretofore covered shall revert to [Melanie]." (See ¶6 (including rider thereto) of Songwriter's Agreement, Exhibit C).

No such royalty statement was provided to Melanie on August 15, 1973, and no royalty payment was remitted to Melanie on August 15, 1973. By registered letter dated August 23, 1973, and delivered to plaintiff on August 24, 1973, defendants duly demanded all royalties due (see Exhibit H annexed hereto). Notwithstanding that demand, plaintiff has persisted in its default.

21. Pursuant to the contractual terms quoted above, if plaintiff's default continues until September 24, 1973, all rights in and to the compositions furnished by Melanie to plaintiff automatically revert to Melanie.

22. It is in this context that plaintiff's abuse of process in obtaining the Order of Attachment and levy

against plaintiff itself can be understood. By the Sheriff's levy, plaintiff is attempting to artificially construct a pseudo-legal defense to the reversion of the musical compositions to Melanie. Plaintiff's obligation to Melanie for royalties under the Songwriter's Agreement is unmistakably explicit, plaintiff's default is brazenly clear, and the consequences of plaintiff's default are plainly spelled out in the Songwriter's Agreement. Plaintiff is therefore confronted with the stark choice of living up to its contractual commitment to pay Melanie timely royalties, or having all rights in and to the compositions revert to Melanie. Plaintiff has on previous occasions in the past similarly defaulted on its obligation to make timely royalty payments to Melanie, finally complying only after being served with formal written demand by Melanie and being confronted by the likelihood of litigation. Defendants respectfully submit that this Court should not countenance plaintiff's improper attempt to use this Court's process as a last-ditch desperate means of avoiding plaintiff's contractual obligations to Melanie.

IV. DEFENDANTS' VALID CLAIMS AGAINST PLAINTIFF PRECLUDE THE GRANTING OF AN ORDER OF ATTACHMENT

23. The Order of Attachment recites that "it appears that plaintiff is entitled to recover said sum [$7[illegible],000.00] above all counterclaims known to it"; this recital is based on the allegation in the affidavit of plaintiff's counsel

submitted in support of plaintiff's ex parte application for an Order of Attachment. The allegation is false.

24. CPLR §6212(a) specifically requires that an order of attachment may not validly issue unless "the plaintiff shall show" that the plaintiff's claim is for an amount "above all counterclaims known to the plaintiff." However, it is clear that this Court is not bound by, and may look behind, plaintiff's mere conclusory allegations in support of its ex parte application for an Order of Attachment. For example, in New Haven Clock & Watch Co. v. McLean Development Laboratories, Inc., 17 Misc.2d 37, 184 N.Y.S.2d 903 (Sup.Ct. 1959), defendant moved to vacate an order of attachment where he had claims against plaintiff in excess of those plaintiff asserted against him. The Court, per Judge Steuer, held that the conclusory language of plaintiff's affidavit that plaintiff's claim was "over and above all counterclaims known to the defendant" was not binding on the court; Judge Steuer further held that "the law is quite clear that an attaching creditor who is aware of a counterclaim asserted by the defendant must set it out and show how his claim exceeds that asserted against him"; finally, Judge Steuer vacated the order of attachment because plaintiff's affidavit "gives no true picture of the situation" concerning defendant's claims against plaintiff. 184 N.Y.S.2d at 904. See also Rothstein v. Autourist A/S, 37 Misc.2d 683, 236 N.Y.S.2d 337 (Sup.Ct. 1963), holding that "whether proof of claim was filed or not,

a valid offset against the plaintiff's claim would be a counterclaim within the scope of [the predecessor statute to CPLR §6212(a)]."

25. Defendants' claims against plaintiff are substantial. In the original action commenced in 1971, defendants still have pending in this Court claims against plaintiff in the amount of $2,000,000.00, which, as noted above, plaintiff concealed in its ex parte application for an Order of Attachment.

26. In addition, and most significantly, as noted above plaintiff owes defendants royalties for the six-month period ending June 30, 1973. These moneys were due and owing not later than August 15, 1973 and are presently due and owing. Plaintiff has admitted in the affidavit of plaintiff's counsel that "plaintiff now holds approximately $80,000 of publishing royalties due defendants" (see ¶15 of affidavit of plaintiff's counsel, annexed to Exhibit B herein). Thus, plaintiff admits that it owes to Melanie an amount greater than that specified in the Order of Attachment; in order for plaintiff to have validly obtained an Order of Attachment in the sum of $75,000.00, plaintiff's claim against defendants would, under CPLR §6212(a), have had to exceed its acknowledged debt to defendants by $75,000.00.

27. In reality, plaintiff is attempting, through an Order of Attachment, to have this Court in effect decide that

plaintiff is excused from paying Melanie her royalty payments until ultimate resolution of plaintiff's pending claim against defendants in Federal Court. This defies well-settled law that a debtor must pay a creditor what he presently owes, notwithstanding the pendency of a lawsuit concerning an amount in dispute between the debtor and creditor (see, e.g., Liberty Die & Button Mould Corp. v. Consolidated Button & Buckle Corp., 160 N.Y.S.2d 728 (App.Div. 1st Dept. 1957); Kaplan v. Anita Eshay Fair Sex Jewels, Inc., 137 N.Y.S.2d 43 (Sup.Ct. N.Y.Cty. 1954), aff'd 287 App.Div. 1044, 141 N.Y.S.2d 508; Green v. Hempstead Bank, 27 App.Div.2d 656, 276 N.Y.S.2d 671 (App.Div. 1st Dept. 1967); it is certainly not an appropriate basis for invoking the extraordinary severity of an Order of Attachment.

V. NO GROUNDS FOR AN ORDER OF ATTACHMENT EXIST UNDER CPLR §6201

28. The asserted statutory authority upon which plaintiff obtained its Order of Attachment is CPLR §6201(1) which permits the granting of an Order of Attachment if "the defendant is . . . not a resident or domiciliary of the state."

29. The affidavit of plaintiff's counsel pursuant to which plaintiff received the Order of Attachment alleges that Melanie "resides in New Jersey and performs worldwide" (see ¶4 of Exhibit B) and, in mere conclusory form, states "Defendants as aforesaid are without the State. This information is

based upon our employment dealings with defendants." (See ¶17 of Exhibit B.) No assertion is made as to the domicile of Melanie Schekeryk--only as to her alleged residence--and no assertion is made as to either the residence or domicile of defendants Amelanie Music or Peter Schekeryk.

30. On their face, these allegations are prima facie insufficient to support the issuance of an Order of Attachment. "[A]n individual defendant is only subject to attachment under this subdivision if he is both a non-resident and non-domiciliary." Wachtell, New York Practice Under the CPLR, p. 193 (1973). "The Advisory Committee Notes . . . . indicate that the defendant must be both a non-resident and a non-domiciliary to obtain an order of attachment of his property." Bender's Forms--Civil Practice, Annotation to Form 6201:3, p. 62-116.

31. The facts set forth herein concerning the residence and domicile of Melanie and Peter Schekeryk are based on deponent's personal knowledge and on the affidavit of Peter Schekeryk (with exhibits) annexed hereto as Exhibit I. Melanie and Peter Schekeryk's wholly-owned company is the leaseholder of an expensive apartment at 200 Central Park South, in New York City. The lease was signed by Peter Schekeryk on March 6, 1972. It is a two and one-half year lease for which the annual rental is $11,880.00. The lease does not expire until September 30, 1974. Melanie and Peter Schekeryk have invested many thousands of dollars in fully

furnishing that apartment, live there much of the year, and, accordingly, maintain full wardrobes there as well as other indicia of actual abode. Both Melanie and Peter Schekeryk receive personal mail at that address on a daily basis. In addition, Melanie and Peter Schekeryk are presently under multi-year contracts with Famous Music Corp. (a subsidiary of Gulf & Western Industries, Inc.), which contract does not expire until after September 30, 1975. Pursuant to their contracts, Famous Music Corp. provides Melanie and Peter Schekeryk with a suite of offices at 1 Gulf and Western Plaza, New York City, New York, from which they regularly conduct their business on a daily basis. Peter Schekeryk owns a New York State driver's license. Their sole substantial out-of-state tie is that, in addition to their New York apartment and New York office, they own a home in New Jersey. However, their actual abode through much of the year is in New York, at their apartment and office, and they consider themselves to be New York residents.

32. The mere fact that Melanie and Peter Schekeryk, in addition to their New York residence and New York office, also own a home in New Jersey is insufficient to subject them to an Order of Attachment. "A person may have more than one residence . . . . Furthermore, a person may have a residence in one place while his domicile is in another." 17 N.Y.Jur., Domicile And Residence, §4. Clearly, under the facts applicable to this case, the defendants are residents of New York

and their property is not subject to attachment under CPLR §6201(1).

33. The applicable caselaw fully supports defendants' position that they cannot be the subject of an Order of Attachment under these circumstances. In Loew's, Inc. v. Dorsey, 197 Misc. 1069, 97 N.Y.S.2d 315 (Sup.Ct. 1950), defendant moved to set aside an Order of Attachment issued on the alleged ground that he was a non-resident of New York State. Defendant was a traveling orchestra leader whose residence "depended primarily on his place of employment" (97 N.Y.S.2d at 316). For a month and a half prior to the issuance of the attachment he occupied a suite in a New York City hotel; prior to that he had been living in California. The Court, noting "the test of residence is whether the defendant had a place of abode in this state, temporary or permanent, at the time of the issuance of the attachment", vacated the Order of Attachment.

34. Similarly, in Zenatello v. Pons, 235 App.Div. 221, 256 N.Y.S. 763 (1st Dept. 1932), the Appellate Division for the First Department reversed the court below and vacated an Order of Attachment where the defendant, who had formerly resided in Paris, France, had lived in New York for eight months. The Court held that "by reason of the severity of the remedy of attachment and of the fact that it is in derogation of common law, the burden of proving the defendant's non-residence as a ground for the issuance of the writ rests on

the plaintiff." (235 App.Div. at 225). Plaintiff here has clearly fallen far short of its burden. In vacating the Order of Attachment, the Appellate Division in Benatello v. Pons relied in large measure on the fact that the defendant Pons was under contract to perform services with a New York opera company. That circumstance is strikingly similar to the instant case, in which the defendants are under a multi-year contract to Famous Music Corp., and maintain and have maintained an office (as well as a New York apartment) at Columbus Circle in New York City throughout that period.

VI. PLAINTIFF'S COMPLAINT IS, PRIMA FACIE, LEGALLY INSUFFICIENT TO SUPPORT AN ORDER OF ATTACHMENT

35. Plaintiff's complaint, which is annexed to its moving papers (see Exhibit B), arises out of defendants' alleged "default" under the terms of the Settlement Agreement referred to above (see ¶¶ 8-10, supra; the Settlement Agreement is annexed hereto as Exhibit F). Although a motion to vacate an Order of Attachment is under most circumstances not a proper forum for resolving disputed factual issues, defendants respectfully submit that the default which plaintiff claims is, prima facie, non-existent.

36. The Settlement Agreement, by its very terms, was entered into with reference to the Songwriter's Agreement between Melanie and plaintiff. The Settlement Agreement obligated Melanie to provide twenty musical compositions to

plaintiff. Melanie complied with this obligation, a fact conceded in the affidavit of plaintiff's counsel (see ¶9 of Exhibit B). In addition, Melanie was required to "record" three of those twenty compositions within two years. It is also conceded in the affidavit of plaintiff's counsel that in fact three such compositions were promptly and timely recorded by Melanie, embodying Melanie's performance of those compositions (see ¶10 of Exhibit B).

37. The terms of the Settlement Agreement, which is in writing, are unambiguously self-explanatory. The entire thrust of the complaint now asserted by plaintiff is that Melanie, in addition to being obligated to record three of the twenty compositions, is also obligated to release them for sale to the general public, even though the terms of the contract do not so provide. Plaintiff claims that the reason plaintiff entered into the Settlement Agreement was its belief that the three songs would be released for distribution to the general public--in addition to being recorded--even though the written contract does not so provide; plaintiff's counsel asserts that plaintiff would otherwise not have insisted or three of the twenty compositions being recorded. This is completely false. As the affidavit of plaintiff's counsel concedes, Melanie is an internationally renowned and talented singer and songwriter. By providing plaintiff with her demonstration records of her own musical compositions, the commercial saleability of those compositions to other

performers and other record companies is tremendously enhanced--that was the value to plaintiff of Melanie's recording three of the twenty compositions. All parties were represented by competent counsel knowledgeable in the music field at the time the Settlement Agreement was negotiated and signed, who were fully aware that "record" and "release" are two completely different terms representing completely different contractual obligations.

38. The most salient factor in this regard, however, is that the Settlement Agreement has absolutely no provision requiring Melanie to actually release for public distribution any of the musical compositions. Furthermore, the Settlement Agreement itself provides that

> "This Agreement cannot be modified, changed or discharged except by writing duly executed by the parties hereto with the same formality as this Agreement."

Plaintiff's counsel, in his affidavit in support of plaintiff's ex parte application for the Order of Attachment, apparently recognized the insurmountable obstacle to a prima facie case by plaintiff when he asserted "plaintiff intends at trial to produce prior writings clarifying the understanding between the parties as well as testimony from those directly involved in the negotiations leading to the [Settlement] Agreement." (See ¶13 of Exhibit B). This allegation is completely unsupported by plaintiff's papers and is in any event absolutely without legal significance for purposes of determining the propriety of the ex parte issuance of an

Order of Attachment. Plaintiff's alleged claims about testimony concerning preliminary "negotiations" leading up to the contract, and about "prior writings", are without legal significance in view of the above-quoted provision of the contract requiring any modification or change in the contract to be in writing. Moreover, even if any such writing did exist, there is no allegation in the affidavit of plaintiff's counsel that any such writing was "duly executed by the parties hereto with the same formality as this Agreement." Furthermore, these allegations are mere conclusory statements by plaintiff's counsel, without specifying the substance of the alleged pre-agreement "conversations", without specifying or annexing to his moving papers the alleged "writings", and without any explanation for the failure of any officer of the plaintiff familiar with the facts to come forward by means of affidavit or otherwise in support of the application. As such, these statements are totally insufficient to justify the ex parte application for and issuance of an Order of Attachment. As the Court stated in vacating an Order of Attachment in Banco Agricola y Pecuario v. Jiminez Export Corp., 97 N.Y.S.2d 437, 439 (Sup.Ct. N.Y.Cty. 1950):

> "The affidavits submitted by plaintiff's attorney in support of the application for the attachments are stated to be upon information and belief' and contain no explanation of the failure of an officer of the plaintiff familiar with the facts to come forward in support of the attachments. . . . . [I]t is not sufficient that the papers upon which the attachment was procured set out the ultimate facts showing the cause of action or the grounds. Evidentiary facts making out a prima facie case proving such facts must be shown, Hart

v. Page Mfg. Co., 187 App.Div. 296, 175 N.Y.S. 502; Lamborn v. Lake Shore Banking & Trust Co., 231 N.Y. 616, 132 N.E. 911; Makepeace v. Dilltown Smokeless Coal Co., 179 App.Div. 60, 166 N.Y.S. 92; Ecco High Frequency Corp. v. Amtorg Trading Corp., Sup., 81 N.Y.S.2d 610. To sustain the attachment the affidavit in support thereof must contain evidence from which the court can determine that the ultimate facts stated can be substantiated. Lepow v. Cervo Export Corporation, Sup., 82 N.Y.S.2d 423; Miller Bros. Const. Co., Inc. v. Thew Shovel Co., 248 App.Div. 150, 288 N.Y.S. 944."

VII. THE EX PARTE ORDER OF ATTACHMENT WAS OBTAINED BY PLAINTIFF'S RECOURSE TO UNCONSTITUTIONAL MEANS

39. Defendants received no notice of plaintiff's application for the Order of Attachment, which was secured by plaintiff in an ex parte application. Plaintiff did not give defendants the opportunity to appear or to be heard. Under these circumstances, defendants respectfully submit that the procedure by which plaintiff obtained the Order of Attachment violated the defendants' rights under the due process clause of the Constitutions of the United States and the State of New York. As one of the leading commentators on the CPLR has explained:

> "Traditionally - and by the express terms of the CPLR - application for an order of attachment, whether before or after the defendant's appearance in the action, could be made by the plaintiff without notice to the defendant. It would now appear clear that, as a matter of due process of law, interference with a defendant's property pursuant to an ex parte order of attachment - without prior notice to the defendant and opportunity to be heard - is not constitutionally permissible other than in

certain limited 'extraordinary situations.'" Wachtell, New York Civil Practice Under the CPLR. p. 195 (1973)

40. The case upon which Wachtell concludes that the ex parte order of attachment in a case such as this is now unconstitutional is the recent Supreme Court opinion of Fuentes v. Shevin, 407 U.S. 67 (1972), a case that presented a factual situation virtually identical to the instant case. In Fuentes v. Shevin, the Supreme Court held unconstitutional, under the due process clause, a State statute permitting a private party, without a showing or without prior notice to the opposing party, to obtain a pre-judgment writ of replevin through an ex parte application upon the mere posting of a bond for double the value of the property seized. The Sheriff, under the statute ruled unconstitutional by Fuentes, was then required to execute the writ by seizing the property, and the defendant could reclaim possession during the pendency of the action only by posting his own security bond for twice the value of the property. The Court held that only under "extraordinary situations" is such an ex parte proceeding permissible; the Court cautioned that "these situations, however, must be truly unusual," and exist "only in a few limited situations." 407 U.S. at 90-91. As examples of the "extraordinary situations" under which such an ex parte proceeding might be constitutionally permissible, the Court cited the needs of a national war effort, the collection of United States internal revenue, protection against the economic

disaster of a bank failure, and protection of the public from misbranded drugs and contaminated food. 407 U.S. at 92. However, in holding the State statutes in question unconstitutional, the Court relied on the fact that those statutes "serve no such important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake." 407 U.S. at 92. That, said the Court, is unconstitutional.

41. This is precisely the situation in the instant case. The defendants respectfully submit that Wachtell's statement accurately reflects the present state of the law, and that Fuentes v. Shevin renders an ex parte Order of Attachment such as that obtained by plaintiff in the instant case violative of the due process clause of the State and Federal Constitutions. The wisdom, fairness, and constitutionality of such a holding is starkly highlighted by plaintiff's actions in the instant case. Without giving defendants an opportunity to present the true and complete facts, plaintiff attempted to obtain a Court Order of Attachment directly affecting defendants' property by depriving the defendants of all procedural rights and by misinforming the Court in the manner detailed above.

WHEREFORE, deponent, on defendants' behalf, respectfully submits that the instant motion should be granted in its entirety.

Sworn to before me this
25th day of September, 1973

234A

Received from AGAC letter delivered

by hand.

(signature)
Kama Rippa Music, Inc.
Kama Sutra Music, Inc.

September 20, 1973

235A

American Guild of Authors and Composers

Lewis M. Bachman
EXECUTIVE DIRECTOR

September 20, 1973

Kama Rippa Music, Inc.
Kama Sutra Music, Inc.
810 Seventh Avenue
New York, New York
10019

Gentlemen:

A messenger brought to our office this afternoon a check for $1,430 and statement showing royalties due of $79,436.

On Melanie's behalf, we do not accept partial payment of royalties due and owing to her.

We hereby reiterate all demands previously made for full payment of all royalties due and owing to Melanie. Pursuant to written demand made upon you by letter dated August 23, 1973 delivered by Registered Mail on August 24th, 1973 and your contractual obligations to Melanie, if full and complete payment of all royalties payable to Melanie is not made by September 24th, 1973 all rights in and to Melanie's compositions revert automatically to her.

Very truly yours,

Lewis M. Bachman

LMB/ck

BY HAND

Ex. 7

236A

Received letter from AGAC delivered by hand.

signature
Kama Rippa Music, Inc.
Kama Sutra Music, Inc.

September 24th, 1973

American Guild of Authors and Composers

Lewis M. Bachman
EXECUTIVE DIRECTOR

September 24, 1973

Kama Rippa Music, Inc.
Kama Sutra Music, Inc.
810 Seventh Avenue
New York, New York 10019

Gentlemen:

A letter was delivered by certified mail to our office this afternoon containing a writers royalty statement and check in the amount of $4,430.00 payable to Melanie Safka dated September 20, 1973. The letter was physically delivered to the receptionist in my absence.

Inadvertently, my receptionist, who is completely unaware of the matter between Melanie and your company signed a receipt for this letter. There was nothing on the envelope to indicate that it contained any matter with reference to Melanie, as opposed to any of the other writer members of AGAC on whose behalf royalties are sent to us by your companies. On Melanie's behalf, we do not accept this partial payment of royalties due and owing to her. Accordingly, I am enclosing herewith and returning the envelope and contents which was delivered today.

I call your attention to my letter of September 20, 1973. On Melanie's behalf, we do not accept partial payment of royalties due and owing to her. We reiterate all demands previously made for full payment and we remind you that pursuant to written demand made upon you by letter delivered by registered mail on August 24th, 1973 and your contractual obligations to Melanie, if full and complete payment of all royalties payable to Melanie is not made by today, all rights in and to Melanie's compositions revert automatically to her.

Very truly yours,

Lewis M. Bachman

LMB/ck
BY HAND

Ex. 8

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

238A

ceo

KAMA RIPPA MUSIC, INC.,

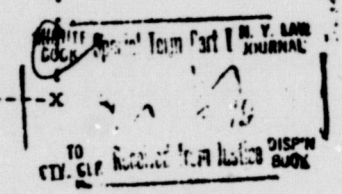
Plaintiff,

- against -

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

INDEX NO. 16516/73



MARKOWITZ, J.:

Defendants move to vacate the order of attachment in this action granted ex parte on September 18, 1973. The court need not pass upon all aspects of the defendants' multifaceted attack upon the order of attachment since, in its ex parte application, plaintiff failed to submit evidentiary proof of its causes of action beyond the $75,000 claimed in plaintiff's first cause of action, and that amount is less than the approximately $80,000 admittedly owed to the defendants by the plaintiff.

CPLR 6212(a) provides:

> "On a motion for an order of attachment the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action and the one or more grounds for attachment provided in section 6203 [sic. 6201] that exist and the amount demanded from the defendant above all counterclaims known to the plaintiff."

As noted by Weinstein, Korn & Miller, New York Civil Practice, section 6212.05:

> "The effect of insisting upon a statement by the plaintiff of the amount by which his claim exceeds any counterclaims is to permit the court to limit the attachment of defendant's property to the amount that is necessary to provide security for plaintiff's demand and thereby avoid tying up any of the defendant's property in excess of that amount."

Since the plaintiff limited its evidentiary

presentation to its claim of $75,000, and since the plaintiff admittedly owes defendants approximately $80,000, there was no legal foundation for the order of attachment.

While the complaint sets forth two additional causes of action, each in the amount of $500,000, the damages alleged in these additional causes of action are totally unsubstantiated and speculative. Hence they do not constitute a proper basis for granting an order of attachment (Weinstein, Korn & Miller, supra., section 6212.04 and 6223.11). Accordingly, defendants' motion to vacate the September 17, 1973 order of attachment is granted.

Settle order.

Dated: November [illegible], 1973

J. S. C.

240A

At a Special Term, Part I, of the Supreme Court, held in and for the County of New York, at the Court House located at 60 Centre Street, New York, New York, on the 23 day of November, 1973.

P R E S E N T:

HON. JACOB MARKOWITZ,

Justice.

- -x

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

- -x

MINUTE BOOK JOURNAL NOV 23 1973 ORDER

Index No. 16516/73

WHEREAS, on or about the 18th day of September, 1973, an Order of Attachment was issued upon the ex parte application of the plaintiff herein at a Special Term, Part II, of this Court, upon moneys in the hands of Kama Rippa Music, Inc., 810 Seventh Avenue, New York, New York, and the offices of Robert L. Casper, P. C., 1780 Broadway, New York, New York, in which the defendants herein have an interest, and upon such debts owed to said defendants as will satisfy plaintiff's demand of $75,000 together with probable interest, costs and Sheriff's fees and expenses; and

WHEREAS, the Sheriff of New York County has served certain levies pursuant to said Order of Attachment; and

person served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

WHEREAS, defendants herein have moved by Order to Show Cause dated September 26, 1973 for an order vacating said Order of Attachment and setting aside all levies made thereunder, and for such other and further relief as may be proper; and

WHEREAS, this Court on November 2, 1973 filed a memorandum opinion, the contents of which are herein incorporated, granting defendants' motion;

NOW, upon reading and filing of the affidavit of Sandor Frankel, dated September 25, 1973, in support of the motion to vacate order of attachment and levies thereunder (with exhibits), the opposing affidavit of Martin Garbus, dated October 5, 1973 (with exhibits), plaintiff's memorandum of law filed October 9, 1973, oral argument of counsel for plaintiff and counsel for defendants heard on October 9, 1973, the reply affidavit of Sandor Frankel, dated October 10, 1973 (with exhibits), the affidavit of Harley I. Lewin (of plaintiff's counsel) in response to the reply affidavit of Sandor Frankel, the letter from Harley I. Lewin, dated October 11, 1973 (with enclosure), the letter from Sandor Frankel, dated October 12, 1973 (with enclosed exhibits), the letter from Martin Garbus, dated October 12, 1973, the letter from Sandor Frankel, dated October 13, 1973, the letter from Martin Garbus, dated October 15, 1973, the letter from Sandor Frankel, dated October 16, 1973 (with enclosed exhibits), the letter from Harley I. Lewin, dated October 18, 1973, and the letter

person served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

from Martin Garbus, dated October 19, 1973, and upon all proceedings heretofore had herein, and upon this Court's memorandum opinion rendered November 2, 1973, and due deliberation having been had, and on motion of the defendants, it is

ORDERED, that the defendants' motion be and the same hereby is in all respects granted; and it is further

ORDERED, that said Order of Attachment issued on September 18, 1973 be and the same hereby is vacated, ~~nunc pro tunc~~; and it is further

ORDERED, that all levies made by the Sheriff of New York County pursuant to said Order of Attachment be and the same hereby are vacated and set aside, ~~nunc pro tunc~~; and it is further

ORDERED, that the plaintiff herein pay to the Sheriff of New York County all of said Sheriff's lawful fees and expenses; and it is further

ORDERED, that any and all property levied upon under said Order of Attachment be paid over to said Sheriff and delivered by said Sheriff to the defendants upon service upon said Sheriff of a certified copy of this Order; and it is further

ORDERED, that ~~defendants herein recover counsel fees in the sum of $6,425.00.~~ that this court does not pass upon defendant's rights, if any, under C.P.L.R. 6212(b).

ENTER

Dated: New York, New York
November 26, 1973.

J. S. C.

FILED
NOV 26 1973
COUNTY CLERK'S OFFICE
NEW YORK

- 243A

OFFICE OF THE SHERIFF
CITY OF NEW YORK
NEW YORK COUNTY DIVISION
HALL OF RECORDS
31 CHAMBERS STREET
NEW YORK, N. Y. 10007
TELEPHONE 566.

H. WILLIAM KEHL
SHERIFF
JOSEPH P. BRENNAN
UNDER SHERIFF, IN CHARGE

ROBERT L. CASPER
1780 BROADWAY
NEW YORK, N.Y.

KAMA RIPPA MUSIC INC
Plaintiff,
vs.
Ms. MELANIE SCHEKERYK, ETC.
Defendant.

All property or monies attached by me on the 19th day of SEPT. 19 73, or any time thereafter, in the above-entitled action, are hereby released, as the order of attachment in the said action has been VACATED by order of the Court.

Joseph P Brennan
~~H. WILLIAM KEHL~~
Sheriff

Dated, New York, N. Y. 27 Nov 1973

Francis T. Lain
Deputy Sheriff

Joseph P. Brennan

Ex. 11

244A

March 2, 1973

Kama Sutra Music
810 Seventh Avenue
New York, New York 10019

Gentlemen:

Your failure to remit timely royalty payments for AGAC members constitutes a material breach of your respective agreements with AGAC writers.

Your retention of copyright is placed in jeopardy failing immediate payment with interest at 6% from due date of payment (February 15th).

Very truly yours,

Lewis M. Bach

LMB:of
REGISTERED MAIL
RETURN RECEIPT REQUESTED

Ex. 12

245A

REGISTERED NO. 529986

POSTMARK OF

Value $ 500	Special Delivery $
Reg. Fee $ 45	Return Receipt 15
Handling Charge $	Restricted Delivery $
Postage $ 05	☐ AIRMAIL
POSTMASTER (By)	

FROM

TO

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐ Show to whom, date and address where delivered

☐ Deliver ONLY to addressee

RECEIPT
Received the numbered article described below

REGISTERED NO. 529986

CERTIFIED NO.

INSURED NO.

(1) SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

(2) SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED 3/5

(3) SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

246A

Robert L. Casper, P.C.
Law Offices

1780 BROADWAY
NEW YORK, N. Y. 10019

(212) 765-
TELEX 4
CABLE: CASPERESQ NEW

ROBERT L CASPER

PETER M THALL

April 11, 1973

Kama Rippa Music, Inc.
Kama Sutra Music, Inc.
Melanie Music
810 Seventh Avenue
New York, New York

Re: Melanie Safka Schekeryk

Gentlemen:

Pursuant to the Rider to paragraph 6 of the agreement between you and Melanie Safka Schekeryk dated as of the 31st day of May, 1968, and in view of your failure to remit royalty statements and payments to Melanie Safka Schekeryk after due demand therefor was made on my client's behalf by AGAC, please be advised that all of Melanie's copyrights heretofore controlled by you, including the renewal copyrights therein, have reverted to her throughout the world, in their entirety.

This letter will serve as my client's demand that all documents, copyright certificates, copies of sub-publishing agreements and license agreements of every type and nature affecting the aforesaid copyrights, together with all part due monies to which my client is entitled, be delivered to the undersigned forthwith. This letter shall also serve as my client's demand that any monies received by you or your affiliates on behalf of or with respect to Melanie and the aforesaid copyrights after the date hereof, be remitted in their entirety to the undersigned.

Very truly yours,

Peter M. Thall

PMT:gr
cc: AGAC
Melanie Safka Schekeryk
Mr. Peter Schekeryk

Registered Mail,
Return Receipt Requested.

COPY

April 18, 1973

KAMA RIPPA MUSIC, INC.,
KAMA SUTRA MUSIC, INC.
AMELANIE MUSIC, INC.
810 Seventh Avenue
New York, New York 10019

Gentlemen:

Reference is hereby made to a certain letter dated April 11, 1973 forwarded to you by our attorney, Peter M. Thall in connection with the Songwriter's Agreement dated May 31, 1968 between us.

This letter, will serve as acknowledgement of your payment to us of royalties due and payable for the period ending December 31, 1972 and notice to you of our withdrawal of all claims made by us pursuant to the rider of Paragraph (6) of our Agreement of May 31, 1968 as contained in our attorney's letter to you.

It is specifically understood and agreed, that you shall continue to have the right, subject to the terms and conditions of our Agreemen of May 31, 1968 to continue to publish all musical compositions subject to our Agreement.

*See below
Acceptance of your royalty statements as tendered to us shall not waive our right of audit for same.

Very truly yours,

AMELANIE MUSIC, INC.

BY _____

MELANIE SCHEKERYK

BY _____

*We further reserve our rights in the future to invoke the said rider to Paragraph 6 of our Agreement of May 31, 1968, in the event future royalties and statements are not tendered when due.

Ex. 14

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

SANDOR FRANKEL, being duly sworn, deposes and says:

1. I am counsel for the defendants/counterclaimants herein and am fully familiar with all pleadings and proceedings heretofore had herein. I make this affidavit on the basis of my personal knowledge.

2. I represented the defendants/counterclaimants in the proceedings in the Supreme Court, State of New York, County of New York, to vacate the order of attachment obtained against them by Kama Rippa Music, Inc. The fee to the defendants/counterclaimants for my services on the proceedings to vacate the order of attachment was $6,425. This amount was based on my hourly charge to them of $50.00 per hour.

3. I have represented Melanie and Peter Schekeryk as clients in several other matters over the course of the last two years, and this has been my standard hourly billing rate to them, which they have paid without exception, throughout this period.

4. Counsel for Kama Rippa fully recognized that if defendants' motion to vacate the order of attachment and levies was granted, "we would be . . . required to pay attorneys' fees." (Affidavit of Harley I. Lewin submitted to the Hon. Jacob Markowitz, dated October 11, 1973).

Ex. 13

5. The $6,425. presently sought as attorney's fees results directly from the motion to vacate the order of attachment and levies thereunder, as follows:

Hours	Date	Description of Services
1	9/20	Attempt to obtain from Clerk's Office, Special Term Part II, papers upon which order of attachment was predicated; order of attachment was not to be entered for ten days, and deponent therefore prepared and caused the service of a demand upon plaintiff's counsel for papers upon which order of attachment was predicated.
84-1/2	9/20-9/25	Preparation of order to show cause, with supporting affidavits and exhibits, on defendants' motion to vacate order of attachment and levies thereunder, including drafting thereof and extensive research on the numerous grounds argued by defendants in support of the motion to vacate.
1	9/26	Obtaining Order to Show Cause on Motion to Vacate Order of Attachment and Levies thereunder at Special Term, Part II, the Hon. Samuel R. Rosenberg, presiding.
1	10/2	Appearance in court in Special Term, Part I, for oral argument before the Hon. Mary Margaret Mangan, argument adjourned for one week by Judge Mangan on motion of plaintiff's counsel.

Hours	Date	Description of Services
2-1/2	10/9	Appearance in court in Special Term, Part I, for oral argument before the Hon. Jacob Markowitz on motion to vacate.
13	10/9-10/10	Preparation of reply affidavit (replying to numerous affidavits and exhibits submitted on plaintiff's behalf, including extensive affidavits of two of plaintiff's attorneys, plaintiff's chief operating officer, and several of plaintiff's investigators, and replying to points raised in plaintiff's accompanying memorandum of law.)
4		Letter to Judge Markowitz dated October 12, 1973 in response to plaintiff's sur-reply affidavit (including consultations with clients and witnesses, and securing documentation in rebuttal to plaintiff's sur-reply affidavit).
2-1/2		Letter to Judge Markowitz of October 13, 1973 in response to plaintiff's purported "Notice of Dismissal" in federal action, a copy of which plaintiff's counsel had submitted to Judge Markowitz (including research).
3		Letter to Judge Markowitz dated October 16, 1973, in response to letter from plaintiff's counsel to Judge Markowitz dated October 12, 1973 (including going to Clerk's Office at the

Hours	Date	Description of Services
		United States District Court for the Southern District of New York to secure documentation with respect to pending federal action).
14-1/2		Consultations and meetings with clients, with Robert L. Casper, Esq. (upon whom order of attachment had been served), and with others of defendants' representatives with respect to issues presented by order of attachment and levies and attempts to vacate same; studying voluminous documents relating to dealings between the parties insofar as those documents were relevant to the impropriety of the order of attachment.
1-1/2	11/7	Preparing proposed order for signature of Hon. Jacob Markowitz, and preparing this affidavit.

Total Hours: 128-1/2 at $50.00 per hour: $6,425.00

6. Deponent respectfully submits that this amount, which is based upon a long-standing fee agreement between my clients and myself, is also a fair and reasonable fee for the value of the services performed. Moreover, deponent respectfully believes that this amount is not an onerous financial burden upon plaintiff (assuming arguendo that such might be consid ıd a relevant factor); plaintiff's parent company, Viewlex Inc., which deponent believes to be a public company whose shares are traded on the American Stock Exchange,

reported in its 1972 annual report assets of $43,879,400.

Sworn to before me this

19th day of December, 1973. _____

MONA RYAN
NOTARY PUBLIC, State of New York
No. 24-8725060
Qualified in Kings County
Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

253A

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

-and-

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC,INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

73 Civ. 3789

AFFIDAVIT

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

ARTHUR KASS, being duly sworn, deposes and says:

1. I am the President of plaintiff corporation and submit this affidavit in support of our motion to dismiss and in opposition to defendants' motion for summary judgment.

2. Mr. Frankel does not know the recording business, the custom and trade of this industry and the background under which the interrelated agreements were performed. As such, his affidavit should be entirely rejected. Each of the "summary judgment" aspects of the m otion must be denied because they involve factual issues.

3. Melanie's first claim against Buddah (paragraph 22 of Frankel's opposition affidavit) relies on language contained in paragraph 2 of the recording agreement where Buddah is obligated to cause the release of certain phonograph records embodying

Melanie's performances to the public during the term of the agreement. Defendants argue that the only right Buddah had to the material was to release it during the term of the agreement. Defendants further argue that the payment to Buddah by Paramount made in settlement of all litigation when Melanie jumped to Paramount in breach of her agreement with Buddah (which factual allegation is not subject to trial under the causes raised herein) prevented Buddah from further releasing Melanie material. Melanie has failed to state she was a beneficiary to this payment. She has no sranding to raise this issue. Only Paramount does. In addition, the argument regarding the payment is wrong. Frankel attempts to create an issue where there is none.

4. The language cited by defendants' counsel is not subject to debate. This is what is known as a release commitment inthe industry where the record company promises to release certain materials which are submitted to it by the artist during the course of the agreement. It is standard custom and usage. The reason such commitment is given is to prevent (from the artist's standpoint) the submission of the material which would then remain "on the shelf" of the record company thereby making no money for the artist despite his hard labors. There is no language in the agreement which says, as Frankel would have this Court believe that if the material is not released within a particular time, Buddah is not permitted to release it. This is ridiculous. Buddah has paid for this material and is entitled to sell it as it deems most proper in order to recoup its costs. The payment by Paramount was for prospective rights and never was to hamstring Buddah as Frankel attempts.

5. Paragraph 24 of the Frankel affidavit is just wrong. The procedure suggested by Frankel that Buddah's only recourse to the master recordings which it had paid for and chosen to release

is to sell them to Paramount. Nothing can be further from the truth. Mr. Frankel has no knowledge of industry practice. This affidavit will show that when an artist leaves one company to another company, the material which the artist has recorded for the first company remains in the hands of that first company to exploit in the most commercially feasible manner.

6. When Paramount paid Buddah for Melanie's recording rights these were not for recording rights from the original date of the Buddah agreement but for all rights subsequent to the time that Melanie jumped from Buddah. The payment was made because Melanie was obligated to record for a further period of time with Buddah. Those were the rights that were purchased from Buddah by Paramount, not the rights to the former material or control over the release thereof. The obligation asserted by Frankel that Buddah should turn around and sell its masters to Paramount is meaningless and contrary to the agreements, the intent of the parties and the practice inthe industry. It totally defeats the ability of a recording company to recoup its costs. In addition, it would wreck havoc inthe industry. There is no provision pointed to in any agreement between Melanie and Buddah which prevents Buddah from releasing the material. Mr. Frankel does not represent Paramount, who, if they wanted the property, could offer to buy it. The provision relied on by Frankel in his paragraph 23 of his affidavit when read in sum and substance with the provisions pointed out in my counsel's original moving affidavit clearly shows that Buddah has retained all rights to the commercial exploitation of the masters which were in its control at the time that Melanie left Buddah for Paramount. Frankel's assertion to the contrary simply does not stand in the race of the facts. The claims against Buddah should be dismissed forthwith for all of the reasons originally stated in my counsel's moving affidavit.

7. Paragraph 25 of Frankel's affidavit deals with Melanie's second claim against Buddah, the alleged violation of the Civil Rights Law of the State of New York, and that Buddah has allegedly misued Melanie's name and portrait in connection with Melanie records. Again, such an assertion illustrates either Frankel's lack of knowledge of the industry or an attempt to mislead the Court. It evidences a blind reading of the agreements. The agreements permit Buddah to use Melanie's name and likeness with materials with which it is authorized to release. It owns and is authorized to release in any form it deems acceptable all material recorded and delivered to Buddah prior to the time that Melanie jumped to Paramount. Buddah's actions in releasing those Melanie records was correct. If such actions were correct, then the use of her name and likeness with respect to the advertising of such records is equally correct, and was specifically preserved in the settlement agreements. All the smoke raised in the Frankel affidavit in paragraph 25 does not deny that very simply fact.

8. One other point should be noted herein. Exhibit "A" to the affidavit in opposition is not relevant. Annual Reports reflect the work that is done by such corporation in the most favorable light possible. The use by Viewlex of Melanie's name and associated with correctly released Melanie material is clearly within its bounds since it refers to a record released by a Viewlex subsidiary and, in all probability, helps Melanie with its free publicity.

9. Paragraph 26 of the Frankel affidavit deals with Melanie's claim that Buddah has deceived the public by re-releasing material previously recorded by Melanie. At the outset, it should be noted that defendants are not representing the class of individuals known as "the public." Buddah's "callus attitude" as alleged by Frankel is a bald attempt to misdirect this Court's sympathy. Buddah may well choose to release a "Best of" album

containing Melanie releases. It is under no obligation to do so. The standard reason for re-releasing certain material over the course of the years after an artist has left the label is because an entirely new generation of record buyers has grown up and is now in a position to purchase those records previously released. It is not deceptive to simply package previously recorded and released material and re-release it. If someone had originally purchased a Melanie record and is about to buy another one all he has to do is turn over the album and check tune titles (which most record buyers commonly do). If someone has not previously purchased a Melanie album and purchases a re-release then he is in effect buying new material. However, while the foregoing discussion may be interesting, it simply is not relevant to whether or not a cause of action is presented on this claim. There is no obligation of Buddah to inform anyone that the material was recorded in any particular year and may or may not have been released previously. The agreements don't require it. Mr. Frankel, one of the junior attorneys representing Melanie at the time many of the agreements in this case were signed, could have tried to write these clauses in. He never did. One calls an album a "Best of" with a view to securing certain market and record purchasers. One does not call it "Best of" for the same reason. There has been no deceptive exploitation of Melanie and there has been no one to come forth and claim same. Melanie herself is in no position to do so as she has not been hurt. In addition, the material released by Buddah is m aterial which Paramount has no interest in. Buddah is firmly within its rights to release such material so long as it pays Melanie, which it has done. Melanie has not been hurt, deceived or economically hindered in any manner. This cause fails to state a claim upon which relief can be granted.

10. Frankel's affidavit (paragraph 27 thereof) seizes upon my counsel's language contained in paragraph 25th of his affidavit, i.e. "90% finished Melanie material." Frankel attempts to mislead this Court. What my counsel stated was as follows: "No provision in any of the agreements between the parties prevents Buddah from completing previously submitted and 90% finished Melanie material and releasing it for sale to the public." Perhaps,his language can be clarified. My counsel in no way stated that the material was released unfinished. What my counsel said was, as is the custom and usage in the recording industry, the finishing touches would be put on ninety percent finished material and the material released would be finished. Buddah has no "dearth of successful or respected recording artists" as Frankel would have this Court to believe. (In fact, recently Buddah has been successful having a number one "single" hit and a number one "album" hit which album and single went beyond the normal "gold" award and received a "platinum record" evidencing enormously high sales.) The Melanie recordings were completely finished when released. There is no detraction as to Melanie's artistic value or Mr. Schekeryk's value as a producer.

11. Frankel's affidavit, paragraph 29 thereof, again seizes upon the "90% finished" language misconstruing same and stating that it is in violation of some contractual provision which has never been discussed. Melanie's releases on the Paramount label have been few and far between and, other than her single initial releas[illegible] have done dismally. This is not due to any problem created by [illegible]e Buddah releases but may be because Melanie, like other recording stars, has peaked and is on the down side of the hill with respect to her acceptance by the public. It may be that Melanie's problems are entirely unrelated to whatever Buddah has done. Nothing that Buddah says, does or releases can change this fact. Melanie has had one "single" hit with Paramount. Melanie had previous numerous hits with Buddah which

material was of finer quality, better produced, better recorded and better sold than the Paramount material. This remains true to date hereof. Melanie is alleging that Buddah has hurt her sales by releasing better material than she is presently making. This is ludicrous. Buddah has released only finished material, not incomplete material and Melanie has paid for all sales on records thereof. As a point in fact, however, even the re-released fine Melanie material has not been doing particularly well in the eyes of the public. The basic reason for this is because Melanie's career is over, not because of anything Buddah would do or has done in the past. Your deponent would respectfully refer this Court to paragraph 30 of my counsel's moving affidavit for the full argument for dismissal with respect to the fifth claim of Melanie against Buddah. Nothing that defendants have raised in their answering affidavit defeats this argument. This claim by Melanie against Buddah fails to state a cause of action and as such must be dismissed.

12. In response to the assertion regarding legal authority raised by Frankel in his paragraph 30 with respect to the equitable relief sought by defendants against Buddah the arguments previously presented by my counsel are not defeated by defendants' answering papers with respect to Buddah's rights to release all material in the form that it deems most acceptable to the public and most likely to make Melanie, Peter and Buddah money from the sale thereof. If the above claims fall likewise, the claims for equitable relief must fall.

ARTHUR KASS

Sworn to before me this

3 day of January, 1974.

Notary Public

ANN E. MENDELSON
NOTARY PUBLIC, State of New York
No. 31-2658865
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

260A

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

-and-

MELANIE AND PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Third Party Plaintiffs,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC. and BUDDAH RECORDS, INC.,

Third Party Defendants.

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73 Civ. 3789
(JUDGE KNAPP)

AFFIDAVIT IN OPPOSITION
(2)

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

ARTHUR KASS, being duly sworn, deposes and says:

1. I am the President of Kama Rippa Music, Inc., plaintiff herein, and I make this affidavit in opposition to the motion for summary judgment by Melanie Schekeryk on certain of her counterclaims in this action.

2. I am annexing hereto as Exhibits "1" and "2" respectively my previous affidavit sworn to the 1st day of October , 1973 and the affidavit of Joseph E. Zynczak, Esq., sworn to the 1st day of October , 1973. These affidavits recite the facts proving that defendants first breached all their agreements between us and that before the attachment proceeding was started, we made every attempt to resolve this matter. They

show the facts surrounding the obligation of the defendants to record and release certain compositions pursuant to the Publishing and Publishing Settlement AGreements between all of us.

3. Defendants' counsel's contentions, both with respect to our publishing deals and with respect to the dealings between the parties in general are simply false. If the defendants themselves gave thruthful affidavits, they would contradict the Frankel affidavit. The only reason Frankel has refused to give affidavits by people who have knowledge of the facts is that these facts (if truthfully told) are consistent with plaintiff's version of the facts. I have read the affidavits of my counsel and can state that all of the facts contained therein are accurate. For example, the defendants contend that our associate recording and production company, Buddah Records, Inc., released records after Melanie had gone to Paramount which the defendants didn't approve. Defendant Peter Schekeryk would contradict this - he and Buddah (including me) kept on a constant stream of communication urging us to publish Melanie's tunes and cause recorded versions of them using Melanie to be released for the public.

4. I can categorically state that since Melanie went to Paramount, the defendants have continually waived the time restrictions on payments due because of publishing royalties. The time is of the essence argument urged by Frankel is nonsense. Rarely, if ever, were payments made according to a strict schedule by Kama Rippa to the defendants. All sides consented to this. That provision having been waived by the conduct of the parties, it cannot be asserted here.

5. The practice grew up between the parties that if we were late in making our royalty payments, Robert L. Casper, P.C., attorney for defendants was to give us a call and ask that at least part of the royalties be sent to Peter Schekeryk and part

to his office and sometimes part to Melanie. Many times, we split the royalties and we paid at different periods.

6. Never once, (until April of 1973) did the defendants invoke the reversionary clause or even demand in writing that royalty payments be made at a particular date which would begin the thirty day period.

7. Documents and checks in this case contradict Frankel. In fact, the practice grew so common between the attorneys for the defendants and my company that we at times even advanced Peter Schekeryk (before we were obligated to make payments) royalties because he had been pleading poverty. In any event, Melanie herself always received her royalty statements on time although the monies would be disbursed according to the instructions of either Peter Schekeryk, her husband, or Robert L. Casper, P.C., attorney.

8. The facts surrounding the April, 1973 dispute are not set forth accurately in the Frankel affidavit. They are relevant to the position that we put forth that the defendants have waived their right to insist on the reversionary clause and are presently estopped from doing so. Mr. Frankel was not then involved so that everything he says is hearsay. There have been numerous modifications of the agreements relied upon. These modifications are documented and Peter Schekeryk cannot truthfully deny them.

9. Just prior to April, 1973, Peter Schekeryk called us and told us that he had recorded Melanie "live" at a Carnegie Hall concert. Peter told us that there were a number of compositions which had been recorded by Melanie at that concert which (a) we held the copyrights on as publisher, and (b) Buddah Records still had the right to release (Melanie was restricted for a period of time after breaching her Buddah contract from re-releasing or re-recording any material which Buddah had received

while Melanie was recording for Buddah).

10. Kama Rippa began negotiations with Peter and Paramount in order to enable Peter to release these records. I was informed by executive personnel at Paramount that Peter was desperate to release this album because he was behind in his album delivery requirements to Paramount and that if he did not deliver this album, he would be in breach of his Paramount recording agreement for Melanie's services and that if he did deliver this album, he would receive an advance of almost $60,000. In an effort to, in all good faith, help Peter and Melanie, Kama Rippa agreed to permit the release of the controlled compositions on a Paramount record. Paramount then agreed to pay us a portion of the publishing royalties and Peter and Melanie had agreed to waive their portion to avoid a double payment.

11. We then we received a reversion demand letter based on a thirty day tolling period. This was all during the time that Peter and I had been negotiating onthe Paramount releases. Ultimately, we worked a trade-off, settling what was never a real dispute. This was the first and only time up to the present dispute that we had ever received a lawyer's letter demanding payments of royalties and bringing up the reversion provision. Up until that time, we had basically complied with the requests of the defendants as to the disbursement of royalties, sometimes holding them back, sometimes advancing them.

12. It was clear that the letter was sent on the reversion question to force our hand with Paramount. It was always clear that the defendants had no intention of insisting onthe reversion clause. Mr. Frankel, who knows nothing of any of this has, of course, not mentioned this in his affidavit.

13. This dispute grew up because of the amendment agreement that we had executed with Melanie and Peter providing

for a limited number of compositions to be delivered to us and three of those compositions to be recorded and released by Melanie. The twenty compositions delivered to us were a sham. Melanie even refused to give us demonstration records of the songs because she was ashamed of them. Three were possible - the other seventeen, if released, would have hurt Melanie's career. In our professional opinion, we are unable to derive any income fromthe publication of such compositions since they are totally unworkable. They are by no means up to the standard that Melanie was and is capable of.

14. It became quite obvious to myself and Bob Reno who atthat time was the professional in charge of publishing at Kama Rippa Music that songs delivered pursuant to our amendment agreement on the publishing were quite inferior to any of the songs we had ever seen. They are essentially a waste. The only way that they have value is if Melanie were to re-work at least the three that she promised to re-work and record and release them. The Schekeryks knew of this- they refused to do anything about it. That action on their part was a breach.

15. During August and September, 1973, Peter Schekeryk raised another issue, namely the purchase of one of the Schekeryk'sinterest in the publishing company. It seemed it would be better if one of us could be bought out. Those discussions were going on and all parties understood that the royalty payments would be a factor in the negotiations. Peter Schekeryk understood, as we all did, that time was not of the essence.

16. My attorneys attempted for weeks to resolve the delivery of material problem. Peter Thall, then Melanie's attorney, refused to tell us whether or not they would deliver the product. He knew that the royalty payments would be withheld if the matter were not clarified.

17. As a matter of equity, it would seem to me that

the defendants have far from clean hands in this matter and that this Court should not let them seek a reversion of the valuable copyrights because they waived their right to it, and have not acted in all good faith under the existing agreements and have breached the agreements.

18. For all the reasons stated herein, and the reasons in all the affidavits we are submitting herewith, I would respectfully request that this Court not grant the motion for summary judgment and to permit this case to go to trial on all the issues herein. I am confident that as a matter of equity and as a matter of law, we will ultimately be successful if this Court permits a hearing on the merits.

/s/
ARTHUR KASS

Sworn to before me this
4th day of January, 1974.

Notary Public

ANN E. MENDELSON
NOTARY PUBLIC, State of New York
No. 31-2658865
Qualified in New York County
Commission Expires March 30, 1975

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- X

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

---------- X

Index #16516/1973

AFFIDAVIT

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

ARTHUR KASS, being duly sworn, deposes and says:

1. I am the President of plaintiff. I submit this affidavit in opposition to the motion to vacate the Attachment.

2. I will in my affidavit deal with three (3) items. First, the facts concerning defendants' non-residence. Second, the severe financial condition that defendants are in, and third, the construction of the August 24, 1971 agreement. I was present at all of those discussions and was a signatory to many of the agreements signed during that period of time.

3. We had a long and continuing professional relationship with the Schekeryks. Throughout that time, they always lived in New Jersey. I am told that their present New Jersey residence is large and is their living quarters. It has a baby's room for the expected infant, servant's quarters and sits

EXHIBIT "J"

on a good deal of land. Prior to the time that they owned this house, they owned other residences in New Jersey. Melanie Schekeryk's parents live in New Jersey.

4. I am advised that they file New Jersey State taxes and that their many cars bear New Jersey license plates.

5. The Schekeryk Enterprises office at 200 Central Park South, New York, New York is right near the Gulf and Western office building where Neighborhood Records does business. I have been advised that this small apartment has few of the facilities that their New Jersey address has.

6. During the time that Melanie was under contract with Buddah their various corporate entities maintained an office at 1650 Broadway. To my knowledge, none of those offices had facilities for living.

7. Annexed hereto are photostatic copies of documents that we have over the years been mailing to New Jersey. We have two addresses for the Schekeryks, either their New Jersey address or in care of their New York attorney, Robert Casper. We have never been advised of a change of address.

8. The facts that I know concerning the Schekeryks indicate that they are in financial difficulty. Peter Schekeryk had been calling one of my associates over the past year in an attempt to get us to buy out an interest he has in a co-publishing venture. He told my associate that he needed the money because of financial pressure. Peter Schekeryk and I spoke in September

of this year. Peter indicated that he needed money very badly; that they were under great financial pressure and; that if we had a check for him for his share of the co-publishing venture, he would be by within the hour to pick it up.

9. I bel_eve that the personal income derived by Melanie and Peter Schekeryk from her personal and his business ventures is such that it causes defendants difficulty. I understand that Neighborhood Records, Peter Schekeryk's company, has sustained a series of reverses. Based on documents furnished to me I know that Melanie's last album entitled "Melanie Live at Carnegie" has as of the date of the last accounting sold 20,000 records. Given the advance that they receive, this puts them in a serious red position.

10. I understand that at the time Melanie Schekeryk, through her various corporate entities, entered into an agreement with Famous, she received a commitment for substantial advances to be paid against royalties. I understand that at the present time, and for some period of time prior, royalties were and are far below the advances. In addition, Neighborhood Records, the defendants' recording vehicle, secured certain monies as an advance against record royalties pursuant to their distribution arrangement with Famous. Due to the aforementioned reversals which Neighborhood Records has had with respect to sales of its record product, including Melanie's product, I understand that a substantial deficit position applies to Neighborhood Records as well as Melanie.

I have never seen the financial records relating to Famous or the Schekeryks since they are there. What I have said is the conclusion that I draw on the basis of documents that they have sent to me and on the basis of that illusory concept known as general industry knowledge.

11. As my attorneys have already stated, it was my understanding in the course of the negotiations related to settlement of our disputes with the defendants, that with respect to three of the twenty compositions to be delivered to us, they would be released by Melanie pursuant to her arrangements with other entities.

12. I have been in the publishing business as well as the record business for a considerable period of time. While it is valuable to have a hit artist's name associated with the writing of a particular composition for sale of that composition to other artists, I have never found it essential to have the artist/songwriter record a demonstration version of the composition for sale. More often than not, we use a much less expensive manner and simpler presentation of a composition to aid us in the sale thereof. In addition, no artist I have ever done business with has chosen a composition to record on the basis of the demonstration tape of the composition being recorded by a name artist. Rather, an artist chooses a particular composition because he feels it lends itself to his style. As such, it is simply ludicrous for the defendants to suggest that the $75,000 placed asa valuation on the three (3) compositions was a value determined by Melanie's recording of said compositions

for demonstration purposes. The $75,000 ($25,000 per tune) was arrived at by estimating the potential sales of such tunes as recorded by Melanie, and released for sale to the public, and the publishing income to be derived from such sales. The contention that defendants have made that their obligation is completely satisfied with respect to the agreement of August 24, 1971 by recording demonstration versions is simply untrue. If we were to have such demonstration records made, we would do it ourselves, on the basis of what we felt was the right song for the right artist, not leave it to the whim of an artist with whom we have little or no business dealings.

13. I respectfully request that this Court permit the Order of Attachment to stand.

ARTHUR KASS

Sworn to before me this
1st day of October, 1973.

Notary Public

ANN E. MENDELSON
NOTARY PUBLIC, State of New York
No. 31-2658865
Qualified in New York County
Commission Expires March 30, 1975

271A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MELANIE SCHEKERYK, et al.,

Defendant.

Index No.

AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

JOSEPH E. ZYNCZAK, being duly sworn, deposes and states that:

1. During August of 1971, I was House Counsel to Buddah Records, Inc. and its related companies, including Kama-Rippa Music, Inc. During such employment, I prepared the letter agreement dated August 24, 1971, between Melanie Schekeryk, Peter Schekeryk, Melanie Music and Kama-Rippa Music, Inc.

2. The last paragraph on page 1-A of the agreement dated August 24, 1971, represented an understanding arrived at by the parties thereto that Melanie Schekeryk would record three compositions of the twenty that were to be delivered by her in satisfaction of her obligations under a co-publishing agreement that the parties had previously entered into in May of 1968. The parties contemplated that the three compositions were to be included on a Melanie album other than the initial album Melanie was to deliver to Paramount Records. Melanie Schekeryk and Peter Schekeryk advised Kama-Rippa Music that pursuant to the recording agreement existing between Melanie Schekeryk, Peter Schekeryk and their appropriate corporation, that the right to select material to be recorded was within their control.

EXHIBIT "2"

The parties further agreed to insure the recording of at least three of the compositions contained in the 20 to be delivered by Melanie that she would pay to Kama-Rippa Music the sum of $25,000 per each composition she failed to record for inclusion in an album to be released and distributed by Paramount Records. The $25,000 amount represented an approximization of earnings Kama-Rippa Music would enjoy as a result of the recording and release of a musical composition in one of Melanie's long playing albums.

3. The word record as used in the agreement is used as it is normally used in the recording industry. It reflects the understanding of the parties that Melanie would record the composition in the same manner as she customarily records a composition to wit; in a professional recording studio, accompanied by professional studio musicians, performing a fully embellished arrangement of each composition, at a cost of several thousands of dollars for each composition embodied in a master recording.

Joseph E. Zynczak
JOSEPH E. ZYNCZAK

Sworn to before me this
1st day of October, 1973.

Normand R. Kurtz

NORMAND R. KURTZ
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-7387900
Qualified in Nassau County
Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

-and-

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Third Party Plaintiffs,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC. and BUDDAH RECORDS, INC.,

Third Party Defendants.

273A

AFFIDAVIT IN OPPOSITION TO CROSS-MOTION FOR SUMMARY JUDGMENT IN FAVOR OF MELANIE SCHEKERYK ON THE SECOND, THIRD AND FIFTH COUNTER-CLAIMS AGAINST KAMA RIPPA MUSIC, INC.

73 Civ. 3789

(JUDGE KNAPP)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HARLEY I. LEWIN, being duly sworn, deposes and says:

1. I am associated with Emil, Kobrin, Klein & Garbus, attorneys for plaintiff and third party defendants herein and make this affidavit in opposition to the motion of Melanie Schekeryk for summary judgment in favor of her on the second, third and fifth counterclaims against plaintiff, Kama Rippa Music, Inc.

2. While counsel for defendants has recited what he alleges to be the factual pattern of this case in his affidavit, such recitation is not correct. In addition, defendants' counsel goes to great lengths to present the argument that the Order of Attachment was obtained by plaintiff, subsequently vacated and, therefore, cannot be relied upon by the plaintiff for any delay in making payments to Melanie.

3. This affidavit will (a) recite a brief factual pattern leading up to the present dispute and (b) cite the law in opposition to the present motion. Mr. Frankel's affidavit omits those facts that are necessary for a complete understanding of this transaction.

I. FACTUAL BACKGROUND

4. There has been a long history of bad faith and misdealings on the part of the defendants with the plaintiff herein. Defendant Melanie at one time had an exclusive artist's recording agreement with Buddah Records, Inc. and exclusive publishing and song writing agreements with Kama Rippa Music, Inc. (dated May 31, 1968).

5. After some dealings between the parties Melanie, in breach of her agreement with Buddah and Kama Rippa went to Famous Music a division of Paramount Corporation and executed exclusive recording agreements on behalf of herself. As part of her overall deal with Paramount, her husband, defendant Peter Schekeryk herein, was given enough money to establish Neighborhood Records, Inc. Melanie, on information and belief, has by signed to Neighborhood Records, Inc., which now has an artist

with Paramount to provide her services for the purposes of making recordings. On January 27, 1971, Buddah and Kama Rippa and others commenced an action against Melanie and a variety of others for breach of the aforementioned agreements. A copy of the verified complaint commencing such action is annexed hereto as Exhibit "A."

6. On August 24, 1971, the parties settled, for the most part, the differences between them and the aforementioned litigation. Said settlement agreement (hereinafter "Settlement Agreement") is annexed hereto as Exhibit "B." As can be seen from the Settlement Agreement, Buddah released Melanie from any obligations to further record for Buddah Records, Inc., and in return Paramount paid Buddah nearly $500,000. Such a payment was for prospective records and the right to record Melanie, not for previous records or any other dealings between Buddah and Melanie. The publishing obligations between Kama Rippa Music, Inc. and Melanie remained to be finalized.

7. Mr. Frankel is unaware of how the record industry works. A record company maintains an independent publishing arm which generally takes an interest in the copyrights of songs recorded by the artists on said record company. This is precisely the case between Buddah, Kama Rippa and Melanie. As such, when Melanie ceased to record for Buddah it really did not make much more sense for Kama Rippa or Kama Sutra to continue publishing Melanie's music. However, there were certain remaining obligations between the parties which had to be dealt with. One of the major problems (as has heretofore been pointed out to this Court) is that the copyrights themselves are not worth much if the artist does not at least record and release several of the compositions relating to said copyrights for sale to the general public.

8. On August 24, 1971, the date of settlement of the aforesaid litigation, Melanie, her husband Peter and their unincorporated business association Amelanie Music reached agreement with Kama Sutra Music, Inc., in settlement of their publishing agreements of May 31, 1968, and their songwriters agreements of May 31, 1968. In sum, the agreement (hereinafter "Publishing Settlement Agreement"), annexed hereto as Exhibit "C," provided that Melanie was to deliver a total of twenty (20) musical compositions written by her to Kama Rippa and such delivery would satisfy all delivery requirements with respect to compositions due Kama Rippa under the aforesaid publishing and songwriting agreements. In addition, Melanie agreed to record within two (2) years of August 24, 1971, not less than three (3) of said twenty (20) musical compositions to be delivered. In the event Melanie did not record said three (3) compositions there was a liquidated damages clause of $25,000 per song or a total of $75,000 if she were to record none of the twenty (20) musical compositions to be delivered to Kama Rippa. The aforesaid agreement incorporated by reference said publishing agreement of May 31, 1968, and songwriting agreement of May 31, 1968. In addition, if Kama Rippa was to receive monies by virtue of the twenty (20) compositions published they would then have to pay Melanie pursuant to the two agreements of May 1968. Thus, this Court must read all three publishing agreements as one for that is precisely the case.

9. Annexed hereto as Exhibit "D" is the agreement dated May 31, 1968, between Kama Rippa and Amelanie Music (stated to be

a New York corporation which is false since an examination of the corporate records of the State of New York revealed Amelanie Music not to be incorporated. In addition, Melanie has not filed a certificate of doing business under an assumed name) which is the agreement providing that Melanie's compositions were to be co-published between Amelanie and Kama Rippa for a period of two years from May 31, 1968. This term was expressly extended. A rider to paragraph 6 of the agreement dated as of May 31, 1968, stated as follows:

> "The payment of royalties when due are of the essence. Accordingly, if publisher fails to account and pay royalties in accordance with this paragraph and such failure and default continues following thirty days written notice of such failure and default this agreement shall terminate and all rights in and to the compositions theretofore covered shall revert to the writer. This provision may be specifically enforced. However, notwithstanding anything to the contrary above, if perrormance of publisher's obligation under this agreement is delayed or becomes impossible or impractical by reason of any act of God, fire, earthquake, strike, labor disturbance, civil commotion, acts of government, its agencies or officers, any order, war (whether or not officially declared), regulation, ruling or act of any labor union or association of composers or employees affecting publisher or the industry in which it is engaged or delays in the delivery of materials and supplies or for any similar or dissimilar reason publisher may, upon notice to writers, suspend its obligations including its obligations to make payments hereunder for the duration of such delay, impossibility, impracticability, as the case may be." [Emphasis added].

10. On or about June 27, 1973 (just short of the expiration date of the agreement of August 24, 1971), Peter M. Thall, Esq. of Robert L. Casper, P.C., attorneys for defendants, advised Kama Rippa that of those twenty (20) compositions

delivered to Kama Rippa under the Publishing Settlement Agreement Melanie had recorded three (3) of said compositions, namely: "I Almost Forgot," "Moonbeam" and "Let Him See Your Smile" in partial satisfaction of her obligations pursuant to said Publishing Settlement Agreement.

11. On July 12, 1973, in response to an inquiry of plaintiff's counsel said Peter Thall advised plaintiff's counsel that defendants saw no obligation to do more than deliver a quarter track demonstration tape of the aforesaid three (3) recorded compositions and in particular not to release said compositions for sale to the public.

12. It was clear that Melanie, because she is signed to her husband's record company, was completely capable of releasing said three (3) compositions for sale to the public. It was equally clear that all parties, at least initially, contemplated that said three (3) compositions were to be released. When Melanie refused to cause the release of said three (3) compositions she was in breach of the Publishing Settlement Agreement and the Publishing Agreement and Songwriter's Agreement of May 31, 1968. It is clear that she is in breach of all three agreements since the first two agreements were incorporated by reference in the Publishing Settlement Agreement and since the Publishing Settlement Agreement contemplated payment pursuant to settlement of all obligations under Publishing and Songwriting Agreements. Based on that breach an attachment was sought. One cannot separate the three agreements into parcels as defendants have attempted to do herein.

13. Defendants have not moved for summary judgment against plaintiff on plaintiff's claim for the $75,000 liquidated damages because they are clearly wrong in failing to deliver the product. In any event, as of September 17, 1973, defendant Melanie and her "company" Amelanie Music were clearly in breach of all of the agreements. While she refused to deliver the three (3) recorded compositions plaintiff had a clear right to hold any royalties which may have been due her under the aforesaid Publishing Agreement of May 31, 1968.

14. As a result of the continued failure of Melanie to cause the release of said three (3) musical compositions in breach of the Publishing Agreement, the exclusive Songwriter's Agreement and the Publishing Settlement Agreement, Kama Rippa had to go to Court.

15. Mr. Frankel's version of the history of this litigation is wrong. A summons and complaint was filed in this Court and given to the Marshall's office for service. The Marshall could not effect service. We knew that in previous litigation the defendants had alleged facts that would divest the Federal Court of jurisdiction. We then filed a complaint in the State Court and decided to move forward in the State Court on a Writ of Attachment to secure assets within the jurisdiction of the New York Courts to satisfy our claim as well as insuring jurisdiction over the defendants. As a result thereof we phoned the Marshall's office and attempted to have him prevent service from being made. No service was had at the Schekeryk residence. We then filed a similar complaint and summons in State Court and secured an Order of Attachment on September 17, 1973. In the

meantime, unknown to this office, Mr. Frankel, as attorney for the defendants, had been personally contacted by the Marshall and had agreed to accept service. Plaintiff, therefore, wound up in two Courts at once. As further evidence of plaintiff's desire to proceed in State Court a Notice of Dismissal was filed in Federal Court. However, because of the previously described problem and a delay in receipt of defendants' answering papers, the notice was subsequently vacated and the Federal Court action was restored.

16. The Order of Attachment was properly secured in Supreme Court, New York. Plaintiff sought an attachment against two parties, Kama Rippa Music, Inc. and Robert L. Casper, P.C. These were the only holders of assets which plaintiff was able to discover which might be used to satisfy a judgment if it was successful. Since the attachment was levied against Kama Rippa and since Melanie was in prior breach of all her agreements with plaintiff, Kama Rippa was not then legally able not to pay the $75,000 attached. In fact, it could not or it would have been in contempt of an order of the Court. Kama Rippa's position was that Melanie had breached the Publishing Settlement Agreement and the Exclusive Publishing and Songwriter's Agreements above mentioned. Kama Rippa did tender the balance of said $75,000, approximately $5,000 to Casper and the American Guild of Authors and Composers. Said sum was refused by both parties and returned to Kama Rippa.

17. It is salient to note that Frankel, in all of the papers heretofore submitted, cites no law with respect to the propriety of the securance of a Writ of Attachment as done herein. He cannot. Plaintiff was fully within its rights and acted in good faith in securing the Writ of Attachment. The Writ of Attachment was secured for two reasons (on plaintiff's assumption that the Federal Court proceeding had been halted after the call to stop service): to secure jurisdiction and to hold those assets which might be used to satisfy plaintiff's judgment which plaintiff was confident and is confident of successfully receiving. These were the only assets in New York which plaintiff was able to discover and so stated in its moving papers to the State Court.

18. On September 25, 1973, defendants procured an Order to Show Cause on a Motion to Vacate the Order of Attachment. The grounds raised and argued by defendants were as follows: (1) plaintiff was guilty of bad faith in obtaining the Order of Attachment; (2) the Supreme Court of the State of New York did not have jurisdiction of the action; (3) plaintiff was guilty of abuse of this Court's process in obtaining the Order of Attachment; (4) that defendants' valid claims against plaintiff precluded the granting of an Order of Attachment; (5) no grounds exist for an Order of Attachment under CPLR 6201 (residence); (6) that plaintiff's complaint, was prima facie legally insufficient to support the Order of Attachment; and (7) the ex parte Order of Attachment was obtained by plaintiff's recourse to unconstitutional means.

19. The defendants went to great lengths in State Court to attempt to point out that plaintiff had abused the State Court's process with respect to the Order of Attachment. Nothing could be further from the truth. In fact, the State Court did not buy the argument. This Court has previously received, on submission by plaintiff's counsel, the entire State Court record with respect to this action. It is respectfully requested that this Court refer to such papers for a complete description of the issues raised and decided on the motion to vacate the Order of Attachment. Unlike defendants' counsel would have this Court believe, the Order of Attachment was not declared void nor was it declared void ab initio. In fact, the State Court chose to rule on the very narrow grounds. The Judge decided that since defendants had not accepted the balance of the claim of $5,000 that their counterclaims outweighed defendants' present claim of $75,000 and as such, the Attachment could not stand. Your deponent, on oral argument was the first to advise the State Court of the money defendants disputed. Your deponent admitted same in open Court. That is why the decision states "plaintiff admittedly. . ." It seems difficult to fathom why your deponent should make such an admission if deponent's intent was to abuse process and deceive the Court. Defendants' contention in this regard is ludicrous. A copy of the entire order vacating the Attachment is annexed hereto as Exhibit "E."

20. It is most important to note that the Court of the State of New York refused to rule on the question of whether or not plaintiff could attach Kama Rippa Music and Robert L. Casper, P.C. It is equally salient to note that the defendants, who

submitted the form of order to the Judge to be signed were neither granted attorney's fees and the words "nunc pro tunc" were specifically crossed out by Justice Markowitz. The Judge did not say the attachment was void ab initio. The Judge did not say the Court's process was abused. The Judge merely ruled that the counterclaims outweighed the claims on their face and as such the attachment should be vacated. Nothing that Frankel says in his moving affidavit can contradict this fact and his attempt to paint a picture to the contrary is quite untrue.

21. It is also important to note that the opinion in support of the order of Justice Markowitz, annexed hereto as Exhibit "F," went to great lengths to cite the reasoning behind §6212 of the Civil Practice Law and Rules of New York, that is, the reasoning behind limiting the amount to be attached. The sentence taken out of context by defendants' counsel with respect to "legal foundation" for the Order of Attachment does not deal at all with the fallacious claims put forth by the defendants with respect to due process, abuse of Court and the like. In fact, the entire sentence reads as follows:

> "Since the plaintiff limited its evidenciary presentation to its claim of $75,000 and since the plaintiff admittedly owes defendants approximately $80,000 there was no legal foundation for the Order of Attachment."

One can see defendants' bald attempt to mislead this Court. The statement relied on by defendants' counsel must be read with respect to the Judge's discussion on CPLR 6212. In addition, it must be read in light of the Judge's refusal to deal with abuse of process or to deal with the question of declaring the Writ

of Attachment void ab initio. The Judge in fact deliberately refused to do so by crossing out the words "nunc pro tunc." It is respectfully submitted that the Judge's decision is dispositive of the question, if any, of plaintiff's process and this Court ought not to interject itself in such a matter.

22. Defendants cannot now come into this Court and ask this Court as to rule on the question of abusive process or the correctness of the procedure used in State Court. For the purposes of this Court proceeding the State Court's ruling (in refusing to rule on certain issues and ruling on others) was despositive of the defendants' argument with respect to the procedural questions raised by defendants herein. The Judge in the State Court matters specifically refused to rule that the attachment was void ab initio or nunc pro tunc. In fact he crossed out such words. The clear meaning of the Judge's decision is that the attachment was not void or voidable nunc pro tunc but that the attachment was vacated only insofar as motion to vacate was granted as of the date of same. If we follow the Siegel, infra, line of reasoning, relied on by defendants, the Judge in the Supreme Court of New York in our case took the case out of Siegel when he refused to declare the attachment procedurally defective ab initio and, therefore, void or voidable. The only basis which Siegel manages to award tortious damages (not claimed herein) is when the attachment was defective ab initio. This Court cannot now enter into the matter and rule against the Judge's' ruling in the Supreme Court case. The Supreme Court case is still pending. This Court does not have the knowledge and has not heard the oral argument that the State Court has and should not interject itself in the State Court proceedings.

23. On November 9, 1973, Frankel petitioned the Supreme Court of the State of New York for attorney's fees allegedly due him from the vacating of the Order of Attachment. This office opposed such award. The affidavit in opposition, salient to Frankel's re-request for such an award, is annexed hereto as Exhibit "G." He again, of course, raised all the issues that he is raising herein. The Court again specifically refused to grant him attorney's fees. The Court did not state its reasons why and any statement by Frankel to do so, as contained in his affidavit submitted herein, simply is not truthful. The Court did not say it would reserve judgment until the end of the case. The Court did not say that the Federal Court ought to rule on the question. In fact, the Federal Court ought not to rule on the question since the State Court has specifically refused to do so and further, since the State Court still retains jurisdiction of the State Court action.

24. As a result of the above set of facts we are now in Federal Court on three motions. Plaintiff and third party defendants have moved to dismiss certain claims against them and moved to dismiss the purported demand for a jury trial. Defendant Melanie has moved for summary judgment based on her reading of the above captioned facts. Her reading, as presented by defendants' counsel, in view of the above facts, simply is not correct.

II. THIS COURT IS REQUIRED TO VIEW THE RECORD IN THE MOST FAVORABLE LIGHT TO PLAINTIFF

25. On summary judgment, the record should be viewed in the light most favorable to the party opposing the motion.

Poller v. Columbia Broadcasting System, Inc., App. D.C. 1962, 82 S.Ct. 486, 368 U.S. 464. In addition, the pleadings heretofore submitted and the affidavit herein must be taken as true on such a motion for summary judgment. Hiern v. St. Paul-Mercury Indem. Co., C.A. La. 1959, 262 F.2d 526. There are clear disputes of material facts. There are clear disputes as to propriety of defendants' actions. There are clear disputes as to: (1) whether or not defendants are in breach of all their publishing agreements with plaintiff, (2) as to defendants' obligations to release three (3) of the twenty (20) compositions heretofore submitted to Kama Rippa, (3) whether or not Kama Rippa was entitled to withhold royalty payments under the Order of Attachment, (4) whether or not Kama Rippa was entitled to withhold royalty payments due under the Publishing and Songwriter's Agreements of May 31, 1968, in view of Melanie's breach of the Publishing Settlement Agreement of August 1971(the Publishing Settlement Agreement must be read together with the two 1968 documents as one since the former incorporated the latter by reference), and, (5) whether or not defendants permanently waived the "of the essence" requirement in paragraph 6 to the Publishing Agreement in view of the prior dealings (admitted by Frankel in paragraph 30 of his affidavit). The annexed second affidavit of Arthur Kass speaks to this issue since it is a question of fact. Plaintiff maintains that it was not obligated to pay such royalties. In addition, plaintiff maintains that the Order of Attachment prohibited the paying up to $75,000 to Melanie until such time as the Order was vacated. Plaintiff did pay the money within a short period of time after the vacating of

the Order of Attachment which money was received and cashed by defendants. (This has been admitted by Frankel). Defendants waived their right to insist on any more than a reasonable time for payment. Finally, plaintiff notes that defendants have in no way said that they were hurt in any manner by the delay of payments. For all these grounds and the grounds discussed below summary judgment should not be awarded in this matter and this Court should hear all issues surrounding the factual pattern above described.

III. AS A MATTER OF LAW THIS COURT SHOULD NOT GRANT SUMMARY JUDGMENT ON THE SECOND, THIRD AND FIFTH COUNTERCLAIMS AGAINST KAMA RIPPA MUSIC IN FAVOR OF MELANIE

26. Even where a motion for summary judgment meets certain technical requirements for the granting of the motion this Court may in its discretion deny the motion. Anthony Grace & Sons, Inc. v. U.S., 1965, 345 F.2d 808, 170 Ct. Cl. 688 reversed on other grounds 86 Sup. Ct. 1539. The Court's duty is not herein to decide factual issues on the summary judgment but only to determine whether there are factual issues to be tried. Arrington v. City of Fiarfield, Ala., C.A. Ala. 1969, 414 F.2d 687. It is clear from the facts above recited that there are substantial issues of facts to be tried before this Court. For this Court to rule on summary judgment which would have the effect of transfering almost $500,000 worth of copyrights from plaintiff to defendants would be unheard of. This Court must hear the issues involved. In fact, this Court does not have to go further than to examine the pleadings heretofore submitted and the affidavits herein submitted to see that a number of

factual issues have been raised with respect to the counterclaims of Melanie Schekeryk, the subject of the within motion.

IV. THE RIDER TO PARAGRAPH SIX OF THE PUBLISHING AGREEMENT OF MAY 1968 TOGETHER WITH MELANIE'S BREACH OF THE PUBLISHING SETTLEMENT AGREEMENT JUSTIFIES PLAINTIFF'S WITHHOLDING AND/OR DELAYED DELIVERY OF ROYALTIES, UNDER ATTACHMENT OR OTHERWISE

27. This Court should take immediate note of the mis-quote of the rider to paragraph 6 of the Publishing Agreement of May 31, 1968, so mis-quoted in paragraph 5 of Frankel's affidavit. The remainder of the paragraph clearly contemplates an Order of Attachment being issued, no matter who the party is (see paragraph 9 above).

28. Plaintiff does not rely entirely on the Order of Attachment to give it grounds for withholding royalties. Plaintiff withheld royalties partially from levy on Order of Attachment, partially because it considered defendants in breach of all the publishing agreements. Although plaintiff has now paid royalties (and it is impossible for defendants to complain that they have been harmed thereby) it is equally arguable that plaintiff could still withhold royalties. As a point in fact, however, paragraph 6 and the rider thereto of the Publishing Agreement of May 31, 1968, clearly contemplates such withholding despite Frankel's mis-quotations to the contrary.

29. As above described, it is clear that the rider to paragraph 6 of the publishing agreements of May 31, 1968, contemplated an act of law as reason for withholding royalties

which might otherwise have been due thereunder. In Flaster, et al. v. Seaboard Gage Corporation, 61 N.Y.S.2d 152 (Sup. Ct. N.Y. Co. 1946) it was specifically held that where the law forbids or prevents performance of a promise, legal when made, the promisor is not liable for breach thereof. This is standard contract procedure. An Order of Attachment has the force of law. The Court ordered Kama Rippa Music, by virtue of the attachment levied by the Sheriff, not to pay out any assets which it might hold on behalf of Melanie. Kama Rippa made an attempt to pay the balance which attempt was refused by the defendants. After the attachment was vacated and despite the breach of all three Publishing, Songwriting and Publishing Settlement Agreement by Melanie, Kama Rippa did on good faith pay all of the money it then held to defendants. The defendants have, of course, accepted the money and cannot now be heard to complain that the delay in any other manner prejudiced them. In Flaster there was a war on and the government prevented the delivery of certain materials. There was a failure to make and deliver certain dyes to be used by the plaintiffs. The Court specifically held that it would be a gross injustice if the law should hold the promisor liable for failing to perform the promised act after the law itself had prohibited the performance. 61 N.Y.S.2d at 155. The only way the promisor in that case could keep his promise is if he were willing to break the law. The only way Kama Rippa could keep its promise to pay Melanie despite her breaches of the aforementioned agreements, would have been to break the law. Kama Rippa cannot now be held to have released its right and

relinquished its right to the subject copyright by virtue of an Order of Attachment which was obtained in all good faith.

V. DEMAND FOR ROYALTIES WAS IMPROPER AND CONFUSION, AS SUCH CANNOT BE RELIED ON BY DEFENDANTS

30. There is a clear issue as whether or not demand was properly made upon Kama Rippa for payment of any royalties that might be due thereunder. While it is true that on August 23, 1973, the American Guild of Authors and Composers sent to Kama Rippa a registered letter demanding immediate payment of whatever royalties might be due Melanie the American Guild of Authors and Composers is not Melanie. The AGAC, upon request of plaintiff, was unable to and refused to produce any appointment of the AGAC as Melanie's agent. Plaintiff would most vigorously contest and has previously raised the issue that the AGAC was not the agent and was not entitled to make such a demand for payment of royalties due. Only Melanie or Melanie's duly authorized agent might make payment to royalties due. As further evidence of the confusing nature surrounding such demand and the requirement that demand be clearly made (rider to paragraph 6 of the Publishing Agreement of May 31, 1968) in addition to the alleged "demand" on August 23, 1973 (which demand is without founding and substance) this office received a demand dated September 13, 1973, from Sandor Frankel and no word from Melanie's actual attorneys Robert L. Casper, P.C. Subsequently, we were advised on September 20, 1973, by Robert L. Casper, as attorney for Melanie and Amelanie Music, that payments

were to be made directly to Melanie by royalty check at 200 Central Park South, New York, New York. A copy of said letter of Robert L. Casper is annexed hereto as Exhibit "I" and a copy of the letter of Sandor Frankel is annexed hereto as Exhibit "H." At this point Kama Rippa is left in a quandry as to where if any place payment should be made. However, it is a good faith effort to put the parties on notice that it did intend at some time in the future to pay all monies which would then be due to Melanie (in compliance with the provisions requiring such notice found in said paragraph 6, Publishing Agreement of May 1968), Kama Rippa sent a letter to the American Guild of Authors and Composers and Robert L. Casper, P.C., reciting that the Order of Attachment had been levied, that it was enclosing the balance and until the Order was either vacated or the issues resolved with respect to Melanie's breach of her agreements with Kama Rippa they would be constrained to withhold $75,000. A copy of said letter is annexed hereto as Exhibit "J." It should be reiterated at this point that in addition to the aforementioned grounds from withholding Kama Rippa has considered and presently does consider Melanie in breach of all of her agreements with Kama Rippa. We noted that the AGAC was not the authorized representative at the time that they made demand. Finally, Melanie had the clear option of putting up a bond in the State action in order to secure the $75,000 which plaintiff was sure to receive on judgment of the issues at hand. If she had put up such a bond (at a cost of approximately $500) the entire $80,000 would have been transferred to her forthwith.

On September 26, 1973, we received another demand, this time from Sandor Frankel requesting whatever monies might be owed to Melanie Schekeryk. As it began to develop, Kama Rippa was "damned if it did and damned if it didn't" and at the same time was under an existing order of the Court. If it had paid out such monies while under order of the Court the Court in its own volition could have declared Kama Rippa in contempt. In addition, Kama Rippa would have been incredibly contemptuous to have first secured an Order of Attachment based on a firm belief that the assets which it held and was about to deliver to Robert L. Casper (not the AGAC) were indeed the only assets of Melanie Schekeryk within the jurisdiction of the New York Courts. If it secured the Order of Attachment and then turned around and paid out the money Kama Rippa would have definitely been held in contempt of Court.

31. Kama Rippa acted in all good faith in (a) obtaining the Order of Attachment, (b) withholding payments due Melanie during the Order of Attachment as a result of her breach of all the agreements with Kama Rippa and (c) paying such money to Melanie immediately after the Order of Attachment was vacated, which money was accepted and converted without a qualm on the part of Melanie. It is salient to note at this point that Melanie has made no allegations as to harm incurred by the approximately sixty (60) day delay in payment or any prejudice resulting thereby.

32. This affidavit will not deal with Frankel's allegations as to the propriety or impropriety of plaintiff's actions in attaching itself. The State Court has already ruled on the question. Your deponent would only note that the self-serving argument put forth in paragraph 15 of Frankel's affidavit has no basis in law or in fact. He attempts to make it appear that the attachment itself was the ground for vacating the Order of Attachment when in fact it was not. In addition, Frankel cites no law for his argument, has not in the past cited any law for this argument and the State Supreme Court, with ample knowledge and opportunity to rule on this question refused to do so.

VI. THE CASE LAW DOES NOT HOLD PLAINTIFF LIABLE IN DECLARATORY JUDGMENT. DEFENDANTS ARE LIMITED TO TORTIOUS DAMAGES, IF ANY, TO BE RECOVERED AGAINST PLAINTIFF'S UNDERTAKING FOR ITS ATTACHMENT

33. Under New York law plaintiff is not liable. In Siegel v. Northern Boulevard and 80th Street Corp., 31 App. Div. 2d 182, 184, 295 N.Y.S.2d 804, 807 (1st Dept. 1968), quoted at length in Frankel's affidavit, the Court did not rule, as Frankel would have this Court believe that in the factual pattern such as the case at bar plaintiff should be held liable in declaratory judgment for securing an Order of Attachment subsequently vacated. In the Siegel case a tort action was brought for damages under a Writ of Attachment. There are no damages in this case nor have defendants alleged any. While it may be true in the Siegel case founded on a writ of attachment being void from the beginning the Court in our case specifically

refused to rule on such a question. In addition, the Siegel case specifically limited itself to an action in tort liability as for trespass or conversion. The action herein is one for declaratory judgment and punitive damages. The Siegel Court, at page 809, apart from describing a number of other cases, specifically stated as follows:

> "There is no doubt about the fact that the rule is that the mere filing of an attachment subsequently vacated does not automatically subject the party who sued out the writ to tort liability as for trespass or conversion. But a tort action does lie where the attachment was procedurally defective ab initio and, therefore, void or voidable."

The State Court in the case at bar specifically refused to rule on whether or not the attachment was defective ab initio. The State Court simply stated that counterclaims outweighed claims and as such the attachment was to be vacated. In addition, the Siegel Court goes on to say that recovery for injury caused by a wrongful attachment is an action in conversion or trespass (295 N.Y.S.2d at 810). Liability is said to flow for any damages proximately resulting therefrom. Defendants in this case have not alleged any such liability. Defendants are not suing in tort. Defendants seek to take this Court and have it rule, under the guise of a question of summary judgment, on a complex set of facts leading to a breach by Melanie of her Publishing Settlement Agreement, Exclusive Songwriter's Agreement and Exclusive Publishing Agreement with plaintiff herein. The Siegel Court states that the prevailing view is that reasonable counsel fees incurred or expended in defending against a wrongful attachment are recoverable (295 N.Y.S.2d at 811). The State Court in our action specifically refused to grant counsel fees to Mr. Frankel. It is clear then that the

State Court did not believe that the attachment was wrongful.

34. Under New York law a party seeking an attachment must place an attachment bond in a percentage of the amount to be attached in order to secure the attachment. The attachment bond provides that the party securing the attachment shall pay to the party whose assets are attached all legal costs and damages which may be sustained by reason of the attachment if the party attached recovers a judgment (CPLR 6212(b)) or if the attachment is vacated. The proper remedy for the defendants herein would be if they are in fact damaged, to sue for damages on the attachment bond. This is what the Siegel case is about. See also Maglificio v. Fidelity, 35 A.D.2d 517, 312 N.Y.S.2d 113 (1970). In Maglificio there was a specific action to recover on an attachment bond. The Court, citing Siegel, held that such a proceeding is precisely correct under the aforecited position of the Civil Practice Law and Rules. It is noteworthy that the provision cited is the specific provision which the Judge in the Supreme Court case in our case refused to rule on. This Court cannot now rule on the same matter.

35. Although more fully detailed in plaintiff's brief submitted herewith, plaintiff would point out Berger-Tilles Leasing Corp. v. York Associate, Inc., 295 N.Y.S.2d 62, 53 Misc. 2d 490 (Sup. Ct. Suffolk Co., 1961). In Berger it was held that an injunction obtained by a tenant subsequent to service of a notice of termination prohibiting certain landlords from terminating a lease to preserve the status quo, tolling the running of a thirty (30) day termination period. In the case

at bar the Order of Attachment in effect acted to preserve the status quo until such time as the Order of Attachment was vacated or there was a finding and resolution on the merits. The argument put forth by defendants that a self-imposed obstacle would not toll such a period is without merit as more fully detailed in plaintiff's accompanying memorandum of law. It is absurd to say that the plaintiff should now be made to convey, by way of summary judgment, almost a half million dollars worth of copyrights because of a sixty day delay in payment of $79,500.

36. In sum and substance then the liability of the plaintiff, if any, for the attachment should be that limited to the undertaking given to the Court on the attachment, that is, the size of the bond. This is what Siegel and Maglificio stand for. The liability of the plaintiff should not be extended to non-damages, that is, reversion of copyrights. Defendants have not alleged damage and have not elected to proceed to sue the plaintiff on the undertaking given in Supreme Court. They have been content to cause the vacating of the Order of Attachment and then come to this Court, who has little knowledge of the proceedings heretofore had in State Court, and ask this Court to rule in a fishbowl on the question of reversion of copyrights. Such question is not proper within the ambit of damages under an Order of Attachment which was subsequently vacated. This is equally true with respect to the recovery of attorney's fees. The State Court chose not to rule on the question of attorney's fees and chose equally well not to rule on any of the other arguments raised by defendants' counsel herein. How then can this Court rule with even lesser knowledge than the State Court had. It cannot and should not.

VII. PLAINTIFF HAD A CLEAR RIGHT TO RELY ON A LEGAL ORDER OF ATTACHMENT AND PAY THE ATTACHED MONEY TO THE SHERIFF.

37. The second argument raised by defendants is that notwithstanding the correctness of the attachment the plaintiff cannot rely on the attachment as a bar to the payment of royalties since the plaintiff secured the order of attachment. For his authorities the defendant chooses to cite Corpus Juris Secundum and Corbin on Contracts. This issue will be dealt with more extensively in plaintiff's accompanying memorandum of law. The plaintiff might agree with defendant's arguments if plaintiff's actions were wrongful, fraudulent or false in any respect. They were not. Judge Markowitz specifically held that they were not. Judge Markowitz has ruled on this question and this Court cannot.

38. In addition defendants are incorrect in two other and most important aspects. In the first instance, as previously stated, plaintiff's reliance on the attachment is only partial. Plaintiff was fully justified in withholding royalties in view of Melanie's prior breach of the Publishing Agreement by refusal to release the three compositions for sale to the public. In the second instance, the obstacle was not created by plaintiff in the manner the cases suggest. The obstacle is created by law. Plaintiff, for jurisdictional reasons and security reasons obtained an attachment, not as Frankel suggests, to avoid payment of royalties.

39. An attachment operates with the effect of law. Plaintiff is so bound. In addition, plaintiff has taken the position and does take the position that the Publishing Settlement Agreement of 1971 is inextricably entwined with the

Exclusive Songwriting Agreement and Exclusive Publishing Agreement, both dated May 31, 1968. Since Melanie is in breach of her Agreements of May 31, 1968, by breach of her Agreement of August, 1971, plaintiff is fully within its rights to withhold royalties (although it chose not to do so in good faith). The reversionary rider relied on for return of the copyrights prayed for in defendants' moving papers simply does not bear on the issue. Said rider specifically refers to acts of government and other similar and dissimilar acts. It is clearly contemplated that an act of law would act as reason to withhold royalties until such time as the question of law is settled. All of the foregoing are factual disputes between plaintiff and defendants herein. All of the foregoing must be fully heard by this Court and not reduced to the mere question of summary judgment.

40. Other language is equally important to noting the effect of an attachment on any debt to be paid. The defendants' statement that a debtor owes a creditor his money notwithstanding the Order of Attachment is erroneous. This Court is respectfully referred to §6204 of the Civil Practice Law and Rules of New York which specifically exempts a garnishee who holds and delivers to the Sheriff money attached. Such holding and delivery to the Sheriff constitutes a discharge from the garnishee's obligation to the defendant to the extent of the payment or delivery.

41. A Sheriff's levy in New York is made in the form annexed hereto as Exhibit "K". We call the Court's attention to the second paragraph of said levy which part of such paragraph reads as follows:

"YOU ARE FORBIDDEN BY LAW, for ninety days after this service and for such additional time as the Court by order may provide, to transfer, pay over or otherwise dispose of the debt or property so levied upon as hereinbefore specified to any person other than the Sheriff except by written direction of the Sheriff. The Sheriff has and claims a lien upon the levied property for his statutory fees and poundage."

It is respectfully submitted herein that the effect of the levy by the Sheriff of an Order of Attachment be it upon the plaintiff by Order of Attachment secured by the plaintiff or be it on a third party (such as Robert L. Casper, P.C. who was also levied against) acts to discharge the garnishee from his obligation to pay a creditor any sums owed. If the defendants are damaged they have redress by seeking damages against the undertaking in State Court. They cannot now, as defendants have herein, come to this Court and ask for reversion of copyrights based on a debt unpaid. In the first instance the debt has been paid. In the second instance defendants have alleged no harm or prejudice resulting from the delay thereby. In the third instance the effect of a Sheriff's levy is to hold monies and freeze the status quo. Finally, §6204 of the Civil Practice Law and Rules specifically contemplates the problems arising between debtor and creditor and the effect of an Order of Attachment.*

* It is to be noted at this point that despite the vacating of the Order of Attachment since the Order of Attachment was successful, that is $75,000 was attached, the party obtaining the Order of Attachment (plaintiff herein), would necessarily have to pay poundage. It would seem logical then that ip poundage is to be paid and the Order of Attachment was successful §6204 is operative in this case.

VIII. AS A MATTER OF EQUITY THIS COURT SHOULD NOT ORDER REVERSION OF THE COPYRIGHTS.

42. There are questions of equity, requiring a hearing before the trier of facts. The first element is the meaning of "of the essence." This phrase is incorrectly relied on by defendants as the contractual obligation requiring a reversion of copyrights. The second element revolves around the powers of an equity court to modify its decree to conform to the realities as opposed to specific enforcement of a particular contractual provision.

43. The rider to paragraph 6 of the Publishing Agreement dated May 31, 1968 begins as follows:

> "The payment of royalties when due are of the essence. Accordingly, if the publisher fails to account and pay royalties in accordance with this paragraph . . . ."

This court must determine whether or not, as a matter of equity, the delay in payment of royalties for a period of sixty days, in view of the prior breach of the Publishing Agreement and Publishing Settlement Agreement by defendants, is sufficient to warrant an order of this court causing the reversion of all copyrights from plaintiff to defendants. Plaintiff would submit it is not. In any event, such a question is not a question to be dealt with as a matter of summary judgment. There is a clear question of fact. It is a question which can only be resolved after a full trial on the issues heretofore presented. The full rider to paragraph 6 (see paragraph 9 above) clearly contemplated that there would be certain delays which might make inevitable a delay in payment of royalties to the

defendants. It would seem then an open question as to whether or not the delay, which delay defendants have not claimed to have resulted in any prejudice or harm to them, is sufficient to warrant a reversion. How can this court possibly determine same without a full hearing.

44. It is clear as a matter of law (which controls) that the designation of the particular date on which a thing is to be done does not make that date the essence of a contract. Ballen vs. Potter, 167 N.E. 424, 251 N.Y. 224 (1929). Equally generally, despite notice in the contracts to the contrary, time is not considered of the essence in agreements in which no serious prejudice can result from the delay. Denker vs. Twentieth Century Fox Film Corp., 210 N.Y.S.2d 241, 26 Misc.2d 1035, modified 213 N.Y.S.2d 214, 13 A.D.2d 627 (N.Y. Sup. Ct. 1961). What constitutes a reasonable time must be determined by the facts and the circumstances of each particular case. Sillur Realty Corp. vs. Lirco Realty Corp., 128 N.Y.S.2d 800, 205 Misc. 720 (n.Y. Sup. 1954).

45. While normally the dates specified in the contract should not be interfered with by a court, the court clearly has equitable grounds herein to make such changes as to reflect the real nature of the dealings between the parties. In the first instance, it should be noted that even assuming Kama Rippa did not make payment without the order of attachment being served, no obligation would ensue to make such payment until thirty days had elapsed from a written demand therefor. Assuming then that the written demand came several months after the delay in payment, there could be a lengthy period of delay

before royalties were paid out. Such a pattern does not fit whether force "of the essence" contracts, specifying a firm date, for example, for completion of a building. No prejudice has been shown by the court sanctioned brief delay herein. The only obligation, if any, that plaintiff should have to defendants for the delay would be, perhaps, an additional payment of interest over the time period of the delay as well as any proveable damage they might have. The question of proveable damage, of course, is a question for the trier of fact.

46. There is a clear distinction to be made between time of the essence (not said in our rider) and timely performance of the essence (which is what in effect the rider to paragraph 6 says). In the first part, where a performance on a particular date is of the essence, the date specified is firm and not subject to fluctuation by whim of the parties. In the latter case, where the time for performance is dependent on the actions of the parties, however, not only is a court of equity enpowered to add the question of reasonableness to the terms of an agreement between the parties but where another period of time is given in the contract for the performance (as herein would be thirty days after demand), the court is in essence required to read in the element of reasonableness. Real Products vs. Buff, 109 N.Y.S.2d 324 (Sup. Ct Jefferson County, 1952). While a notice of a definite thirty day period was specified in terms of the agreement, the period did not commence until demand was made. At best, this could mean a sixty day delay or more in the payment of royalties assuming that the payment of royalties was not immediately forthcoming on the other due date. How then can "of the essence" have meaning. It cannot. The court must hear the dealings between the parties to determine the import they have given to their agreement.

47. It is to be reiterated at this point that the defendants have in no way alleged that they have been prejudiced or otherwise harmed by what amounted to a reasonable delay in the payment of royalties until the question of attachment had been resolved. In addition, such a delay is not to be considered unreasonable in view of the plaintiff's contention that defendants have been in breach of their agreements to deliver compositions under the Publishing and Songwriting Agreements and Publishing Settlement Agreement.

48. The question of reasonableness is a question which must go to the jury. As a general rule, time is usually of the essence in mercantile and option contracts and real estate agreements. As an equally general rule, where there are royalties coming in, time is rarely made of the essence. The operation of the parties herein confirms that time is not really of the essence since there was a prior default by Kama Rippa (recited by Frankel) which default was waived by the defendants after payment of royalties due them. Even at that time, they were not heard to complain that they had suffered any prejudice or hardship by the delay. They cannot now come to this Court and ask this Court to order approximately $400,000 worth of copyrights to be turned over to them by virtue of a sixty day delay sanctioned by the Judge of the Supreme Court New York after hearing ex parte, all the facts granted the order. As a matter of equity, this is unconscionable.

49. As a general rule, a stipulation for the payment of money at a particular time will not be regarded as an essential part of an agreement. A breach thereof would generally not admit of a destruction of a contract. At the same time, an express stipulation making time of the essence

will be enforced unless to do so would be unconscionable. Hudson City Savings Bank v. Brockhurst, 49 A.2d 436, 138 N.J. Eq. 582. There is no New York law in support of the defendants' theory. All they have said is that where an obstacle to performance is created by the person charged with performance, he cannot rely on the obstacle. They do not, however, cite any authority in support of their contention where such obstacle is created as a matter of law. We would submit that it is perfectly proper for an Order of Attachment to issue and the first Judge in New York Supreme Court agreed. We would equally submit that plaintiff was justified in seeking such Order of Attachment in view of its very good case for the $75,000 damages sought for non-performance. Plaintiff operated in all good faith and despite Melanie's breach of all the Publishing Agreements with the plaintiff, paid the monies due Melanie pursuant to said agreements within a short time after the vacating of the Order of Attachment. The Order of Attachment was not the entirely relied upon by plaintiff to withhold its monies. We would submit that this Court as a matter of equity cannot permit itself to rule that a reversion of a half million dollars of copyrights may take place on the basis of a sixty (60) day delay or the difference of $4,500 (amount separating $75,000 and $79,500). This is particularly true without any claims that any prejudice has resulted. This Court, as an equity court, since that is the relief requested by defendants, should grant summary judgment on the claims for declaratory and injunctive relief.

IX. THE REQUEST FOR COMPENSATORY AND PUNITIVE DAMAGES IS IMPROPER

50. Frankel's prayer for a summary judgment with respect to attorney's fees on the basis of work done in the securing of an Order of Attachment is improper. This question was specifically ruled upon by the Supreme Court of the State of New York and they refused to grant him counsel fees. This Court cannot now grant him counsel fees as compensatory damages. Annexed hereto as Exhibit "G" aforementioned is the affidavit of your deponent which was submitted to the Supreme Court and they ruled against Frankel's request for attorney's fees. The argument in said affidavit is raised herein by reference.

51. Frankel's affidavit in paragraph 34 thereof assumes that Justice Markowitz in the Supreme Court made certain motions on his own volition to refer the question of ees to this Court. Nothing could be further from the truth. The Siegel case, so amply argued by Frankel, makes the clear statement that counsel fees are a proper award at the time of the vacating of the attachment if counsel for the party who was successful in vacating the attachment moves for same. In our case, Frankel did move and was refused counsel fees. It cannot be said that by such refusal, that Justice Markowitz left it to this Court to make such a determination.

52. With respect to the idea that exemplary and punitive damages ought to flow from the set of facts forming the subject matter herein, this Court does not have before it any facts to make any finding with respect to punitive damages. In addition, punitive damages are generally awarded where there

has been damage to the public and where private damages cannot effect redress. In this particular case, the public has not been damaged nor has any allegation of the same been made. There has been no finding that plaintiff has misused in any manner the State Court's legal process. Plaintiff, on the contrary, obtained the legal process not through any misrepresentation of facts and not through any twisting of procedure. Plaintiff's actions in this matter were clearly open and with justification. Plaintiff will undoubtedly recover the $75,000. Defendants' position with respect to their default under the publishing agreements is completely untenable.

53. One other point ought to be noted. Defendants' counsel's affidavit has claimed, as discussed above, that $7,700 as compensatory damages as the damages to be awarded in the fifth counterclaim and $25,000 in punitive damages to be awarded also on the fifth counterclaim. This would bring a total of approximately $32,700 as compensatory and punitive damages on the fifth counterclaim. It is most interesting to note that in the fifth counterclaim itself (paragraphs 99 and 100 of the "Answer and Counterclaims of Defendants") defendants sought damages for their attorney in the amount of $50,000 and exemplary and punitive damages in the amount of $1,000,000. Now, when this Court looks at the facts and the defendants are put in the position of supporting them, they have reduced their claim substantially (although already denied by the Supreme Court in New York when applied for). If such a reduction can take place without any hearing it is hard to imagine that even more facts may not come to light at a full hearing of this matter.

54. In view of all of the information contained above as well as that contained in the two affidavits of Arthur Kass (the latter including an additional affidavit of Arthur Kass and Joseph Zynczak), plaintiff believes that there are innumerable questions of fact which must be resolved and that only can be resolved at a full and complete hearing on the merits. The situation is far more complex and detailed than defendants' counsel would have this Court believe. In particular, if Melanie is found to be in breach of the agreement, meaning the Publishing and Songwriting Agreements, it would constitute a prior breach of the agreement absolving plaintiff from liability. In addition, there is substantial question, factually, as to the facts and circumstances surrounding the securing of the Order of Attachment, its purpose and levy. There are also questions regarding waiver and estoppel on the part of plaintiff which can only be determined from hearing regarding the prior actions of the parties. Finally, defendants do not come into this Court with clean hands. As an equitable matter and in view of the tremendous imbalance between the relief requested by plaintiff and the relief requested by defendants and, in view of the power of this Court as the court of equity to modify any judgment it might issue, this Court must hear all the facts in open trial.

55. It is respectfully requested, therefore, that the motion for summary judgment be denied in all respects and that this case proceed to trial on the merits.

HARLEY I. LEWIN

Sworn to before me this
4th day of January, 1974

MARLENE H. LINDER
Notary Public, State of New York
No. 31-7557600
Qualified in New York County
Certificate Filed in Kings County
Commission Expires March 30, 19 74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

308A

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

-and-

MELANIE AND PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Third Party Plaintiffs,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC. and BUDDAH RECORDS, INC.,

Third Party Defendants.

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73 Civ. 3789
(JUDGE KNAPP)

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

MARGUERITE A. STENSON , being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 338 East 83rd Street, New York, N.Y. On January 4, 1974, deponent served the within

(1) Affidavit in Opposition to Cross Motion for Summary Judgment in Favor of Melanie Schekeryk on the Second, Third and Fifth Counterclaims against Kama Rippa Music, Inc. with Exhibits;

(2) Memorandum of Law in Opposition to the Motion for Summary Judgment;

(3) Reply Affidavit in Support of Plaintiff's Motion to Dismiss;

(4) Kass Affidavit in Opposition(1); and

(5) Kass Affidavit in Opposition(2)

at 225 Broadway, New York, New York upon Sandor Frankel, Esq., the attorney for the defendants herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorney for the defendants therein.

Marguerite A. Stenson
MARGUERITE A. STENSON

Sworn to before me this
4th day of January, 1974.

Marlene H. Linder
Notary Public

MARLENE H. LINDER
Notary Public, State of New York
No. 31-7557600
Qualified in New York County
Certificate Filed in Kings County
Commission Expires March 30, 19 74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY RECEIVED
EMIL, KLEIN, MARX & CARBUS
JAN 10 1974

- -x

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

--and--

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

- -x

310A

REPLY AFFIDAVIT IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT IN FAVOR OF MELANIE SCHEKERYK ON THE SECOND, THIRD AND FIFTH COUNTERCLAIMS AGAINST KAMA RIPPA MUSIC, INC.

73 Civ. 3789

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

SANDOR FRANKEL, being duly sworn, deposes and says:

1. I am counsel for the defendants/counterclaimants herein and respectfully submit this affidavit in reply to the affidavits and memorandum of law submitted on behalf of Kama Rippa Music, Inc. ("Kama Rippa") which oppose the instant motion of Melanie Schekeryk ("Melanie") for summary judgment on the second, third, and fifth counterclaims asserted by

Melanie against Kama Rippa.

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2. What emerges clearly from the opposing papers submitted on Kama Rippa's behalf is that despite Kama Rippa's repeated generalizations to the contrary, there is not a single material fact in dispute between the parties with respect to Melanie's second, third, and fifth counterclaims against Kama Rippa. In all the pages of Kama Rippa's affidavits and memorandum of law, much of which is absolutely irrelevant to the instant motion, Kama Rippa does not dispute the following dispositive facts:

(a) Kama Rippa and Melanie entered into the Songwriter's Agreement annexed as Exhibit 2 to deponent's moving affidavit*;

(b) Kama Rippa and Melanie entered into the Agreement Regarding Remaining Songwriting Obligations annexed as Exhibit 3 to deponent's moving affidavit**--although

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* In describing this Songwriter's Agreement, the affidavit of Kama Rippa's counsel omits naming Melanie as a party (see p. 4, bottom line thereof). This is apparently a typographical error, as the copy of the Agreement annexed to counsel's affidavit is identical to the copy of the Agreement annexed to deponent's moving affidavit, and is signed by Melanie as a party.

** The affidavit of Kama Rippa's counsel inaccurately states (at p. 4, line 4) that this Agreement was signed by Kama Sutra Music, Inc., Kama Rippa's affiliate, rather than by Kama Rippa itself. This is evidently another typographical error, as the remainder of that paragraph refers to Kama Rippa, and the copy of the contract annexed to counsel's affidavit, which is identical to that annexed to deponent's moving affidavit, is signed by Kama Rippa as a party and not by Kama Sutra.

Kama Rippa chooses to call this agreement the "Publishing Settlement Agreement";

(c) Kama Rippa was required, under the Songwriter's Agreement and under the Agreement Regarding Remaining Songwriting Obligations, to furnish to Melanie a full royalty payment not later than August 15 of each year, including 1973, for the preceding period of January 1 through June 30 of that year;

(d) The Songwriter's Agreement and the Agreement Regarding Remaining Songwriting Obligations provided that timely payment of royalties by Kama Rippa to Melanie is of the essence of both agreements, and that if Kama Rippa failed to make payment by August 15 and if such default continued for 30 days after written demand, then all rights in and to all the musical compositions revert automatically to Melanie;

(e) The Songwriter's Agreement and the Agreement Regarding Remaining Songwriting Obligations expressly grant Melanie the right to specific enforcement of the above provisions, including reversion of all rights in and to the musical compositions;

(f) Kama Rippa failed to pay Melanie her royalties on August 15, 1973, notwithstanding the fact that Kama Rippa owed Melanie $79,436. for the period January 1, 1973 through June 30, 1973;

(g) Written demand for payment of Melanie's royalties was made by the American Guild of Authors and Composers

("AGAC") on August 24, 1973 (Kama Rippa now protests, for the first time in the many years that Kama Rippa has been paying Melanie's royalties to AGAC, AGAC's authority to act as Melanie's agent; this protestation is entirely frivolous--see ¶¶ 4-9 , infra);

(h) Kama Rippa did not pay Melanie within 30 days of the written demand which Kama Rippa received on August 24, 1973;

(i) Kama Rippa did not pay Melanie until November 27, 1973 (and has additionally failed up to the present to pay her the interest that had accrued by that time);

(j) The Order of Attachment against Melanie which was levied upon Kama Rippa was obtained on Kama Rippa's own ex parte application and was caused to be so levied by Kama Rippa itself;

(k) The Order of Attachment was vacated in Supreme Court, State of New York, by the Hon. Jacob Markowitz, as having "no legal foundation" (see memorandum opinion and order of Judge Markowitz annexed as Exhibits 9 and 10 to deponent's moving affidavit);

(l) Kama Rippa did not appeal from Judge Markowitz' order, and the time within which to do so has expired.

It is respectfully submitted that the only issue to be decided, in view of the above undisputed facts, is the legal effect of Kama Rippa's default, an issue which is precisely the purpose of the summary judgment provisions of the Federal Rules of Civil Procedure.

3. In an attempt to construct an "issue of fact" where none exists, Kama Rippa claims that the following "factual issues" can only be determined after a full hearing:

(a) Whether AGAC was authorized to demand on Melanie's behalf royalty payments which Kama Rippa owed Melanie; and

(b) Whether Melanie "waived" her rights under the rider to paragraph 6 of the Songwriter's Agreement.

For the following reasons, it is respectfully submitted that both of these purported "factual issues" which Kama Rippa is now attempting to create are afterthoughts of no substance, with which Kama Rippa is now attempting to avoid the consequence of its plain and gross default on royalty payments, its brazen misuse of the State Court's process, and the unequivocal reversionary provision of its agreements with Melanie.

AS TO AGAC'S AUTHORITY TO DEMAND ROYALTY PAYMENTS ON MELANIE'S BEHALF FROM KAMA RIPPA

4. Kama Rippa, while admitting that it received AGAC's demand letter on August 24, 1973, states that "AGAC, upon request of plaintiff, was unable to and refused to produce any appointment of the AGAC as Melanie's agent . . . . AGAC was not [Melanie's] agent and was not entitled to make such a demand for payment of royalties due." (Affidavit of Kama Rippa's counsel, ¶ 30). This contention is frivolous.

5. AGAC, after mailing the demand letter on Melanie's

behalf, received a reply letter from Kama Rippa's counsel (a copy of which is annexed hereto as Exhibit 1), stating that Kama Rippa "always made timely payment to Melanie." Subsequently, Kama Rippa's attorney sent a second letter to AGAC, requesting a copy of AGAC's contract with Melanie; AGAC referred counsel's second letter to deponent, as Melanie's attorney. Deponent, on September 13, 1973, sent a letter to Kama Rippa's counsel which, in addition to reiterating on Melanie's behalf previous demands for payment of her royalties, informed Kama Rippa's counsel that AGAC had forwarded to deponent counsel's request for a copy of AGAC's contract with Melanie, and requesting Kama Rippa's counsel to "please inform me of the reason for this request." (A copy of deponent's letter to Kama Rippa's counsel is annexed hereto as Exhibit 2). Deponent never received a reply to this letter.

6. Annexed hereto as Exhibit 3 is a copy of Melanie's contract with AGAC, entered into on June 19, 1968. (The authorization is in the name of Melanie Safka, Melanie's maiden name, as Melanie was not yet married at the time). In this agreement, Melanie expressly grants AGAC the right "to demand, receive, collect, deposit, and process all royalties which may be or become due and payable to me" (see ¶ 7 thereof). Although the affidavit of Kama Rippa's counsel makes no mention of this, deponent mailed to Kama Rippa's counsel a copy of AGAC's authorization to act on Melanie's behalf approximately three months ago in connection with the

motion to vacate the order of attachment in State Court--where Kama Rippa also unsuccessfully asserted the same alleged lack of AGAC's authority as Melanie's agent. In fact, Kama Rippa's own affiliate, Kama Sutra Music, Inc., is itself under contract with AGAC (see Exhibit 4 annexed hereto). Moreover, annexed hereto as Exhibit 5 is a copy of a letter sent on October 27, 1970 by Saul R. Maslan, then AGAC's staff auditor, to plaintiff's affiliate, Kama Sutra, enclosing a copy of AGAC's authorization from Melanie. Kama Sutra resides and does business at the same address and from the same office as Kama Rippa and has and uses the same offices, employees, officers, and facilities; in fact, Kama Rippa's songwriting royalties to Melanie have always been paid by check drawn on the account of Kama Sutra (including Kama Rippa's belated check of $79,436. to Melanie which was finally received by Melanie on November 27, 1973, which check was also drawn on the account of Kama Sutra).

7. In short, Kama Rippa and Kama Rippa's counsel have been dealing with AGAC as Melanie's authorized agent for years, and have for years been delivering Melanie's royalty payments to AGAC. When Kama Rippa previously defaulted in its last royalty payment to Melanie (for the semi-annual period ending December 31, 1972), AGAC was also the agent which served written demand on Melanie's behalf (see Exhibit 12 to deponent's moving affidavit), and Kama Rippa never questioned AGAC's authority to do so.

8. In addition to the above, the most irrefutable proof of Kama Rippa's acceptance and acknowledgment of AGAC's authority to act on Melanie's behalf is that when Kama Rippa attempted to make partial payment of $4,436. on September 20, 1973 (when $79,436. was due and owing to Melanie), Kama Rippa transmitted its check for $4,436. to AGAC (as previously noted, this partial payment was refused on Melanie's behalf); and when Kama Rippa again attempted on September 24, 1973 to make partial payment of $4,436. to Melanie, this partial payment was again tendered to AGAC as Melanie's agent (again, this partial payment was refused on Melanie's behalf).

9. Additionally, the Court is most respectfully referred to Exhibit J of the opposing affidavit of Kama Rippa's counsel: a letter from Kama Rippa to AGAC purporting to explain Kama Rippa's "positi[illegible]-that Kama Rippa's having caused service of a levy upon itself "constrains [us] to withhold" $75,000. of the $79,436. due to Melanie-- and that therefore Kama Rippa was attempting to persuade AGAC to accept the balance of $4,436. That letter was written to AGAC by Kama Rippa's president, Arthur Kass. Significantly, Mr. Kass, in the affidavit he has submitted in opposition to the instant motion, does not deny AGAC's authority to act on Melanie's behalf, and does not deny that for many years Kama Rippa has been dealing with AGAC as Melanie's duly authorized agent. The question of AGAC's authority is raised only by Kama Rippa's counsel. For the above reasons, it is

respectfully submitted that the contention is frivolous.*

MELANIE'S ALLEGED "WAIVER" OF HER CONTRACTUAL RIGHT TO TIMELY PAYMENTS OF ROYALTIES

10. Kama Rippa asserts, through the affidavit of its president, Mr. Arthur Kass, that the requirement of timely payment of royalties has in the past been "waived" by Melanie and that therefore Melanie should somehow be deemed by this Court to have "waived" timely payment of her royalties for the period January 1, 1973 through June 30, 1973. Thus, Kama Rippa attempts to excuse its present default by relying on its previous defaults. Despite what Mr. Kass concedes to have been Kama Rippa's previous late royalty payments, Mr. Kass' affidavit states (at ¶ 6), "Never once (until April of 1973) did the defendants invoke the reversionary clause or even demand in writing that royalty payments be made at a particular date which would begin the thirty day period."

11. It is respectfully submitted that this Court need not determine whether these statements are true--for even assuming arguendo their accuracy (although their accuracy is

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* Moreover, in addition to AGAC, deponent, as Melanie's counsel, made several written demands to Kama Rippa on her behalf for full payment of royalties by registered letters dated September 13, 1973 and September 26, 1973 (see Exhibits 6 and 7 annexed hereto). Both of these letters were received by Kama Rippa more than two months before finally, on November 27, 1973, Melanie's royalties were received.

denied in the affidavits of Melanie and Peter Schekeryk annexed hereto collectively as Exhibit 8), they would not constitute a defense to Melanie's claim for reversion of the copyrights, for the following reasons.

12. The most obvious proof that the "waiver" defense is totally frivolous is the fact that Kama Rippa, in its Reply to Melanie's Counterclaims, did not even assert "waiver" or anything remotely similar to "waiver" as a defense (a copy of Kama Rippa's reply is annexed hereto as Exhibit 9). For that reason alone, Kama Rippa's claims of "waiver" should not even be considered by the Court. (See Rule 12(h) of the Federal Rules of Civil Procedure.)

13. The reason that Kama Rippa did not assert "waiver" as a defense to Melanie's counterclaims is obvious from a reading of the contracts in question. The Songwriter's Agreement specifically provides:

> "No waiver of any provision of or default under this Agreement shall affect either party's rights thereafter to enforce such provision or to exercise any right or remedy in the event of any other default whether or not similar." (See ¶ 19 of Songwriter's Agreement.)

The Agreement Regarding Remaining Songwriting Obligations also provides:

> "No waiver by any party hereto, whether express or implied, of any provisions of this Agreement or of any breach or default of any party, shall constitute a continuing waiver of such provisions or of a waiver of any other provision or provisions of this Agreement and no such waiver by any party shall prevent such party from enforcing any and all provisions of this Agreement

or from acting upon any subsequent breach or default of any other party, under any provisions of this Agreement." (See p. 3 of Agreement Regarding Remaining Songwriting Obligations.)

14. Mr. Kass' affidavit does not dispute that after all of the alleged acts constituting "waiver" which he alleges occurred, Melanie's right to timely payment of royalties was promptly reasserted in connection with her right to timely payment of royalties for the period July 1, 1972 through December 31, 1972, as described in paragraph 30 of deponent's moving affidavit. Mr. Kass' affidavit admits (at ¶ 16) that whatever may have previously occurred, "the defendants [did] invoke the reversionary clause" by April of 1973. It is undisputed that when Kama Rippa failed to make timely payment of royalties to Melanie for the semi-annual period ending December 31, 1972, Melanie demanded in writing that payment of royalties, then late, be promptly made; nor does Mr. Kass deny that on April 11, 1973 Melanie's general counsel sent to Kama Rippa notice that because of Kama Rippa's default in making timely royalty payments the copyrights had reverted to Melanie. Thus, even assuming arguendo that as Kama Rippa now asserts Melanie had periodically in the past waived her right to timely payment of royalties up to that point, the law is well-established that:

> "After a condition of payment of instalments (or of other performance) on time has been eliminated by accepting such payments after default or by a mere waiver, it can be re-established by giving a definite notice to the debtor, provided that the notice gives a reasonable time for

making up past deficiency and specifies that later instalments must be paid on time as originally agreed." 3A Corbin, Contracts, §722.

The Court is most respectfully referred to additional authorities cited and discussed in the accompanying reply memorandum of law, at Point III.

15. Certainly, even if Melanie had in the past permitted Kama Rippa's late payment of royalties without undertaking legal action, AGAC's letter of March 2, 1973 and the additional letter of April 11, 1973 from Melanie's general counsel (see Exhibits 12 and 13 to deponent's moving affidavit) made unmistakably clear to Kama Rippa that timely payment of royalties was of the essence, as prescribed in the Songwriter's Agreement and the Agreement Regarding Remaining Songwriting Obligations, and that failure to make timely payment would result in reversion to Melanie of all rights in and to the musical compositions. The reversion that had resulted from Kama Rippa's earlier default, for the semi-annual period ending December 31, 1972, was not judicially enforced only because Kama Rippa conditioned payment of royalties which were unquestionably then due on Melanie's agreement to withdraw the reversion claim she had already asserted in her counsel's letter to Kama Rippa of April 11, 1973. Again, in her letter withdrawing her claim for reversion of copyrights for Kama Rippa's default for the period July 1, 1972 through December 31, 1972, Melanie explicitly advised Kama Rippa:

"We further reserve our rights in the future to invoke the said rider to Paragraph 6 of our

> Agreement of May 31, 1968, in the event future royalties and statements are not tendered when due." (See Exhibit 14 annexed to deponent's moving affidavit.)

Indeed, Kama Rippa's memorandum of law concedes (at p. 20 thereof) "the defendants preserved their theoretical right to invoke the [reversion] right at a later date" (although nowhere does Kama Rippa explain why the explicit contractual reversion right which was preserved was merely "theoretical").

16. Thus, any misapprehensions which Kama Rippa may have been laboring under with respect to Melanie's "waiver" of her right to timely payment of royalties could not have been corrected in stronger language. This is simply not a case in which one party has lulled another party into incorrectly believing that certain rights would not be invoked. Rather, Kama Rippa was warned in the strongest and most straightforward way possible over a prolonged period of time that Melanie did not waive any of her rights under the Songwriter's Agreement or the Agreement Regarding Remaining Songwriting Obligations, including her right to invoke the reversion clause if royalty payments were late.

17. These clear and unambiguous warnings were repeated when Kama Rippa again defaulted in timely royalty payments for the period now at issue, January 1, 1973 through June 30, 1973. ACAC's letter of August 23, 1973, which Kama Rippa concedes was received by Kama Rippa on August 24, 1973, stated that Kama Rippa's failure to remit royalties to Melanie on time "constitutes a material breach of your agreement with

her," and that "your retention of copyrights is placed in jeopardy" (see Exhibit 5 to deponent's moving affidavit). Kama Rippa's attorney responded to AGAC by a letter in which Kama Rippa's attorney stated:

> "Please be advised that our clients have always made timely payment to Melanie with respect to any and all royalties which may be due her pursuant to their agreement." (See Exhibit 1 annexed hereto.)

This assertion by Kama Rippa's own counsel plainly contradicts the claim now made here by Kama Rippa that Melanie had waived the right to timely payment of royalties by accepting Kama Rippa's late payments in the past. AGAC's next letter to Kama Rippa, on September 20, 1973 (rejecting partial payment of $4,436.) repeated the warning to Kama Rippa that Kama Rippa was in default of its obligation to pay Melanie her royalties on time and that if the default continued beyond September 24, 1973 all rights to the musical compositions would revert automatically to Melanie (see Exhibit 7 to deponent's moving affidavit). AGAC's next letter to Kama Rippa, on September 24, 1973 (again rejecting partial payment of $4,436.) repeated these warnings (see Exhibit 8 to deponent's moving affidavit). On September [illegible], 1973, deponent reiterated to Kama Rippa's counsel all previous demands for payment of royalties then due and owing (see Exhibit 6 annexed hereto). On September 26, 1973, when Kama Rippa's default had continued for more than 30 days following written demand, deponent sent to Kama Rippa (and, among others, to Kama Rippa's counsel) a registered letter advising Kama

Rippa that because of its default in making timely royalty payments all rights in and to the musical compositions had reverted to Melanie (a copy of deponent's letter is annexed hereto as Exhibit 7). Yet payment of royalties to Melanie was not made until two additional months had transpired. Moreover, on October 10, 1973, Melanie's Answer and Counterclaims in this litigation in which Melanie asked for the declaratory judgment which is the subject of the instant motion, was served upon Kama Rippa's counsel. Payment was received only one and one-half months later.

18. In view of the above documented history of dealings between the parties, none of which is disputed by Kama Rippa, it is respectfully submitted that the assertion by Kama Rippa that Melanie "waived" her rights under the rider to paragraph 6 of the Songwriter's Agreement is a frivolous afterthought. All of the papers submitted by Kama Rippa on this motion are a tacit admission of this: Kama Rippa does not suggest the slightest way in which it acted or altered its position on a "belief" of this alleged "waiver", or that it otherwise rendered itself incapable of performing. What simply happened in this case was that Kama Rippa, acting on the assumption of its president that Melanie and Peter Schekeryk were always "pleading poverty" (see ¶ 7 of affidavit of Arthur Kass), deliberately and wrongfully withheld royalty payments unquestionably due to Melanie in order to exert economic pressure on Melanie to release three recordings which Melanie is not required to release. Melanie

resisted this financial pressure, and took the affirmative legal action of moving in State Court to vacate the improper order of attachment. It is respectfully submitted that the legal consequence of Kama Rippa's prolonged and inexcusable default is the reversion to Melanie of all rights in and to the musical compositions.

19. In addition to these two "factual" issues, Kama Rippa attempts to present legal arguments in opposition to the present motion for partial summary judgment. The affidavit of Kama Rippa's counsel, apparently in an attempt to convey the impression of a multitude of issues, restates each issue repeatedly and in many different forms (see, e.g., affidavit of Kama Rippa's counsel at p. 14, "issues" 1, 2, and 4 thereof). Additionally, the legal issues are discussed not only in Kama Rippa's memorandum of law but in the affidavit of its counsel, apparently to create the impression that these legal issues are questions of fact. The legal questions raised by Kama Rippa, in addition to the two fictitious "factual" issues discussed above, are the following:

(a) alleged procedural defects in the summary judgment procedure;

(b) the temporary "shield" allegedly provided by the order of attachment;

(c) the alleged right to withhold Melanie's royalty payment because of Melanie's refusal to "release" three recordings;

(d) equitable considerations.

20. All of the above are legal issues which are perfectly capable of resolution by this Court on the instant motion for summary judgment, without trial; they are all discussed in the accompanying reply memorandum of law submitted herewith, and, it is respectfully submitted, each of Kama Rippa's arguments should be rejected by the Court.

21. Among the repeated assertions of Kama Rippa in opposition to the instant motion is that the moving affidavit on this motion was submitted by deponent rather than by deponent's clients (see, e.g., Kama Rippa memorandum of law, Point II). However, the instant motion is based upon undisputed authentic contracts, documents, and State Court proceedings conducted by deponent on Melanie's behalf. What is involved in this motion are the legal consequences of undisputed facts. For that reason, deponent's affidavit is totally sufficient. Lula v. Sivaco Wire & Nail Co., 265 F.Supp. 222 (S.D.N.Y. per vP Bryan, J. 1967). Indeed, Kama Rippa's main opposing affidavit is submitted by Kama Rippa's counsel. However, rather than permit Kama Rippa to attempt to divert the Court's attention from the substance of this motion, annexed hereto collectively as Exhibit 8 are affidavits of Melanie and Peter Schekeryk expressly adopting the assertions of deponent's moving affidavit and of this affidavit.

22. The affidavits and memorandum of law submitted by Kama Rippa in opposition to the instant motion repeatedly

attempt to justify Kama Rippa's default in paying Melanie her royalties by alleging that Kama Rippa was entitled to do so because Melanie allegedly violated the "release" provision of the Agreement Regarding Remaining Songwriting Obligations, even though said agreement contains no "release" provision. A sufficient answer to this contention is that even if Melanie did breach the contract as alleged by Kama Rippa--which, as will hereinafter be shown, is untrue--Melanie's alleged breach would not justify Kama Rippa's withholding of her royalty payments. (This is discussed in the reply memorandum respectfully submitted herewith, at Point IV thereof). Kama Rippa has tacitly conceded this by finally and belatedly paying Melanie her royalties when the order of attachment was vacated, despite Kama Rippa's present protestation that Melanie has allegedly violated the Agreement Regarding Remaining Songwriting Obligations.

23. Kama Rippa's obligation to pay Melanie her royalties on time is absolute and unconditional. The Songwriter's Agreement specifically provides the sole circumstance under which Kama Rippa would be entitled to withhold royalties: in case of any infringement lawsuit (see ¶ 10 of Songwriter's Agreement). This is the sole contractual authority granted to Kama Rippa to withhold Melanie's royalties.

24. The affidavit of Kama Rippa's counsel, recognizing that Kama Rippa has in effect conceded that its argument of justification is meritless by having finally paid Melanie her royalties after the order of attachment was vacated, states

(at ¶ 28): 328A

"It is . . . arguable that plaintiff could still withhold royalties."

Deponent respectfully submits that although that proposition is, like all propositions, "arguable", the argument--which Kama Rippa never makes--would be frivolous. The Songwriter's Agreement and the Agreement Regarding Remaining Songwriting Obligations give Melanie the unconditional right to receive her royalty payments on time (with the sole exception in the case of an infringement lawsuit).

25. As previously noted, the irrelevancy of Kama Rippa's claim that Melanie allegedly breached the Agreement Regarding Remaining Songwriting Obligations by not releasing the three recordings is fully discussed in the accompanying reply memorandum (at Point IV), and deponent does not wish to burden the Court with a repetition of those authorities here. However, despite the fact that Melanie's alleged breach is irrelevant to the instant motion, Kama Rippa, by repeatedly asserting that Melanie's breach leaves her with "unclean hands" and that therefore this Court should not grant a declaratory judgment, has attempted to color this motion with an aura of alleged misconduct by Melanie. For that reason, it may be appropriate to correct Kama Rippa's statements concerning the nature of Melanie's alleged breach, despite the irrelevancy of that alleged breach to the present summary judgment motion.

26. The sole respect in which Melanie is alleged to

have breached any contractual obligation Kama Rippa is by refusing to release to the record-buying public three demonstration recordings under a written agreement which nowhere provides or suggests that those recordings must be so released. The original Songwriter's Agreement obligated Melanie to deliver to Kama Rippa twenty musical compositions for each of three years, or a total of 60 compositions (see ¶¶ 14 and 16 of the Songwriter's Agreement; ¶ 14 further provided that the number of compositions "may be averaged" over the three-year term). It is now undisputed that Melanie delivered 65 compositions to Kama Rippa during the term (see Exhibit 4 to deponent's moving affidavit, enumerating the titles of 85 compositions Melanie has delivered to Kama Rippa (which includes the additional twenty delivered under the Agreement Regarding Remaining Songwriting Obligations); Kama Rippa has not disputed the accuracy of this list). However, in order to avoid extensive and prolonged litigation in 1971 when Kama Rippa insisted on receiving additional compositions*, Melanie signed the Agreement Regarding Remaining Songwriting Obligations. This required Melanie to deliver twenty additional compositions and to "record"--nowhere is "release" mentioned in the contract--three of those twenty compositions. It is undisputed that these twenty additional compositions were timely delivered to and accepted by Kama Rippa in 1971.**

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* Kama Rippa was at the time making inconsistent claims as to the number of musical compositions Melanie allegedly owed. See, e.g., the two self-contradictory letters from Kama Rippa annexed hereto collectively as Exhibit 10.

** The affidavit of Kama Rippa's president alleges (at ¶ 14)

(cont'd. on next page)

It is further undisputed that three of the twenty compositions were recorded by Melanie on demonstration records for Kama Rippa's use in developing the copyrights.*

27. Thus, Kama Rippa's repeated allegations of Melanie's "unclean hands" stem solely from Kama Rippa's claim that Melanie, although she delivered timely to Kama Rippa the twenty compositions and three demonstration recordings, did not release the three recordings to the record-buying public

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that these twenty additional compositions were "inferior" and "essentially a waste". This is the first time in the nearly two and one-half years that have elapsed since the twenty compositions were delivered that this assertion has been made; however, although the issue is irrelevant to the instant motion for reversion of the copyrights, the affidavit of Kama Rippa's own counsel concedes (at ¶ 10) that "those twenty (20) compositions [were] delivered to Kama Rippa under the Publishing Settlement Agreement." Indeed, Kama Rippa has published, distributed, and sold the twenty songs (plus four other songs) in a songbook (the second songbook Kama Rippa has published of Melanie's musical compositions) entitled "Another Side of Melanie" featuring "21 brand new Melanie songs" (the cover of said songbook is annexed hereto as Exhibit 11). Moreover, Kama Rippa's present last-ditch efforts to avoid reversion of the copyrights are rather puzzling if Melanie's musical compositions were so inferior. In any event, it is clear that Kama Rippa accepted the twenty additional compositions two and one-half years ago.

* Despite the ambiguous suggestion to the contrary in the affidavit of Kama Rippa's president (at ¶ 13), the affidavit of Kama Rippa's counsel concedes (at ¶ 10) that demonstration records were provided for three of the twenty compositions: "I Almost Forgot", "Moonbeam", and "Let Him See Your Smile". Kama Rippa's counsel suggests through ambiguous phrasing (at ¶ 10) that the transmittal letter of June 27, 1973 from Melanie's counsel to Kama Rippa stated that the three compositions had been recorded in "partial" satisfaction of the contract; the letter stated no such thing.

when the contract nowhere required her to do so. The entire thrust of the Complaint now asserted by plaintiff is that Melanie, in addition to being obligated to deliver the twenty compositions and to record three of them, is also obligated to release the three recordings for sale to the general public even though the terms of the contract do not so provide. But Melanie is now and has been for several years under an exclusive record contract with Paramount Records; the Songwriter's Agreement and the Agreement Regarding Remaining Songwriting Obligations are publishing agreements, not record-release agreements; Kama Rippa is not even a record company--it is the publishing arm of Buddah Records, Inc.

28. By providing Kama Rippa with her demonstration records of her musical compositions, the commercial saleability of those compositions to other performers and other record companies is tremendously enhanced--that was the value to Kama Rippa of Melanie's recording three of the twenty compositions. All parties were represented by competent counsel knowledgeable in the music field at the time the Agreement Regarding Remaining Songwriting Obligations was negotiated and signed, and all were fully aware that "record" and "release" are two completely different terms representing completely different contractual obligations. It is significant that nowhere does Kama Rippa's president or counsel state to the Court that in the music business, or in any other business or context, "record" means "release". In fact, deponent most respectfully refers the Court to para-

graph 8 of the affidavit of Kama Rippa's counsel, in which Kama Rippa's counsel describes Kama Rippa's interpretation of the Agreement Regarding Remaining Songwriting Obligations: nowhere is it claimed that Melanie is required to cause the "release" of the three recordings. Annexed hereto as Exhibit 12 is a copy of an affidavit of Robert L. Casper, Esq., the attorney who represented Melanie and Peter Schekeryk in the discussions leading up to and culminating in the Agreement Regarding Remaining Songwriting Obligations (the original of this affidavit was submitted in State Court in connection with the motion to vacate the Order of Attachment); Mr. Casper describes the complete absence of any agreement to release the musical compositions, and the fact that "record" (the word used in the agreement) and "release" (the word not used in the agreement) have separate and distinct meanings and convey separate and distinct obligations.

29. Kama Rippa, apparently aware of the obvious difficulty in its present position in view of the absence of the obligation to "release" in the agreement, has previously asserted (in an affidavit filed in the Order of Attachment proceedings in State Court) "plaintiff intends at trial to produce prior writings clarifying the understanding between the parties . . . ." Significantly, not a single such "writing" has yet been produced.

30. The affidavit of Kama Rippa's counsel stresses repeatedly that because of the order of attachment which Kama

Rippa had obtained and caused to be levied upon itself, "Kama Rippa was damned if it did and damned if it didn't" (¶ 20) and that Kama Rippa could not pay Melanie her royalties on time "or it would have been in contempt of an order of the court" (¶ 16), an order which Kama Rippa had itself obtained. Thus, Kama Rippa invokes the defense of legal prohibition, referring the Court to the contractual clause excusing non-performance under an act of law. With or without such a contractual provision, a defense based upon a legal prohibition is ordinarily valid; however, this defense is unavailable to a party such as Kama Rippa which is the very cause of the issuance of the legal prohibition. Deponent most respectfully refers the Court to the authorities cited and discussed in the original memorandum of law previously submitted on Melanie's behalf. Kama Rippa's disingenuous argument entirely ignores the fact that Kama Rippa caused the issuance of the Order of Attachment and levies, and Kama Rippa could have avoided its self-created "dilemma" merely by consenting to Melanie's prompt motion to vacate. But Kama Rippa chose to persist in its default, as a consequence of which, it is respectfully submitted, all rights in and to the musical compositions have reverted to Melanie by express and unambiguous contractual terms.*

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* The affidavit of Kama Rippa's counsel also states several times that the order of attachment was sought to obtain "in rem" jurisdiction. Although irrelevant, this is inaccurate. The order of attachment was obtained ostensibly to provide "security" for any final judgment, not to ob-

(cont'd on next page)

31. The affidavit of Kama Rippa's counsel suggests (at ¶ 40 and at p. 27, footnote) that Kama Rippa complied with the order of attachment which Kama Rippa had caused to be levied upon itself, and that that compliance forced Kama Rippa into its self-imposed "dilemma". The inaccuracy of this suggestion is the strongest proof of the fact that Kama Rippa was abusing the Court's process by improperly obtaining the order of attachment, and that Kama Rippa was merely playing a game with the Court's process. Kama Rippa never complied with the order of attachment which it had obtained and which it had caused to be levied upon itself; Kama Rippa never delivered the $75,000., or even one penny, to the Sheriff pursuant to the order of attachment. The affidavit of the counsel to the Sheriff of the City of New York, attesting to this fact, is annexed hereto as Exhibit 13.

32. The affidavit of Kama Rippa's counsel further states (at ¶ 30) that Kama Rippa was "left in a quandry as to where if anyplace payment should be made." The basis for this "quandry" is alleged to have been deponent's demand letter of September 13, 1973 to Kama Rippa on Melanie's behalf (Exhibit H to affidavit of Kama Rippa's counsel), and a letter from Melanie's general counsel (Exhibit I to affidavit

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tain in rem jurisdiction. Nowhere in Kama Rippa's moving papers in its ex parte application for the order of attachment was in rem jurisdiction even mentioned, only the alleged need for "security".

of Kama Rippa's counsel). Deponent's letter of September 13 in this regard merely states "appropriate demand has previously been made for payment of royalties due to my clients, and I reiterate that demand on their behalf." Obviously, deponent's letter did not suggest the slightest variance from Kama Rippa's previous practice of remitting royalty payments to AGAC or to Melanie directly. The letter of Melanie's general counsel which Kama Rippa also now claims left them in a "quandry" as to where to send the royalty payment, explicitly states: "Please be advised that demands previously made for payment of royalties to Melanie are hereby reiterated, and payment may be made directly to Melanie by delivery of her royalty check to her at 200 Central Park South, New York, New York." Kama Rippa could not possibly have been confused by these instructions, and its belated claim to the contrary is frivolous. If Kama Rippa did not know where to send Melanie's royalty payment, it could simply have asked. Obviously, there was no need to ask.

33. The affidavit of Kama Rippa's counsel further attempts to create an obstacle to the instant motion by asserting several times that "the State Court case is still pending" (see, e.g., ¶¶ 22, 23). Kama Rippa's attempt to divest this Court of jurisdiction because of the prior proceedings relating to the order of attachment in State Court has previously been rejected by this Court by order dated November 16, 1973 (a copy of said order is annexed hereto

as Exhibit 14). Just as Kama Rippa is now attempting to relitigate Judge Markowitz' order vacating the Order of Attachment, Kama Rippa now similarly asks this Court to reconsider its own previous order. There are no new facts or proceedings to justify this. The State Court "case", to which Kama Rippa refers, is totally dormant. All that has occurred is service of the State Court "complaint". Issue has not been joined. Defendants promptly moved in State Court for dismissal of the complaint because of the prior pendency of this action in this Court (see, e.g., Hogg v. Allen, 277 App.Div. 893, 98 N.Y.S.2d 180 (2d Dep't 1950); Stanley Electrical Service, Inc. v. City of New York, 26 App.Div.2d 951, 275 N.Y.S.2d 222 (2d Dep't 1966); Berzin v. Litton Industries, Inc., 29 App.Div.2d 857, 288 N.Y.S.2d 552 (1st Dep't 1968).) This motion (and a companion motion to vacate a "notice of deposition" served by Kama Rippa in direct violation of CPLR 3106(1)) is presently under advisement in State Court. No counterclaims have been asserted in State Court. The fact is that the counterclaims upon which Melanie now seeks summary judgment are pending only in this Court, and these counterclaims have never been brought in any other Court.

34. The affidavit of Kama Rippa's counsel opposes Melanie's application for attorney's fees by stating (at ¶¶ 23, 50) that the State Court "specifically refused to grant . . . attorney's fees." This is inaccurate. Judge Markowitz held:

"ORDERED, that this Court has not passed upon defendant's right, if any, under CPLR 6212(b)",

the statutory provision for recovery of damages on vacating of an order of attachment. The judicial authority for counsel fees on a successful motion to vacate an order of attachment, cited in deponent's moving affidavit at paragraph 33, is not questioned by Kama Rippa, and no conflicting authority is cited. Instead, Kama Rippa's counsel has annexed to his affidavit a prior affidavit which he submitted in the State Court proceedings, in which Judge Markowitz did not rule on the issue of counsel fees; deponent respectfully annexes hereto as Exhibit 15 the reply submitted by deponent to Judge Markowitz in response to the affidavit which Kama Rippa's counsel submitted to Judge Markowitz.

35. The affidavit of Kama Rippa's counsel concedes (at ¶ 45) that Kama Rippa owes Melanie $1,275. in interest (see ¶ 35 of deponent's moving affidavit), which Kama Rippa still has not paid.

36. It is respectfully submitted that all of the above undisputed facts fully justify this Court in granting the motion for summary judgment sought herein on Melanie's second, third, and fifth counterclaims, including punitive damages for Kama Rippa's gross misuse of the State Court's process. The affidavit of Kama Rippa's counsel states (at ¶ 53) that because punitive damages of only $25,000. are being sought in the instant motion, "if such a reduction can take place with-

out any hearing it is hard to imagine that even more facts may not come to light at a full hearing of this matter." Yet nowhere does Kama Rippa suggest any such additional facts; the plain reason is that there are none. All the relevant facts are now before the Court, undisputed. It is respectfully submitted that the only conclusion to be drawn from these facts is that Melanie is entitled to a declaratory judgment that all rights in and to the musical compositions have reverted to her, as a matter of law, and that she is further entitled to the compensatory and punitive damages sought herein.

WHEREFORE, it is respectfully submitted that the instant motion for summary judgment in favor of Melanie Schekeryk on the second, third, and fifth counterclaims against Kama Rippa should be granted.

Sworn to before me this
[illegible] day of January, 1974.

[illegible]

[illegible]
[illegible] 74

EMIL, KOBRIN, KLEIN & GARBUS

ATTORNEYS AT LAW

D - 339A
AUG 1973
MADISON SQ

ARTHUR D. EMIL
LAWRENCE A. KOBRIN
ARTHUR J. KLEIN
MARTIN GARBUS
MICHAEL P. FRANKFURT

WILLIAM F. PURCELL
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ROGER H. KIMMEL

540 MADISON AVENUE, NEW YORK, N.Y. 10022
(212) MU 8-6040
CABLE ADDRESS ADEMILLAW
TELEX WUI 620231

August 29, 1973

Mr. Louis Backman
American Guild of Authors
and Composers
50 West 57th Street
New York, New York

Re: Kama Sutra and Schekeryk

Dear Mr. Backman:

Your letter dated August 23, 1973 to our clients, Kama Sutra Inc. and Kama Rippa Inc., has been forwarded to us for reply.

It seems that the attorney for Melanie Sofka has given you a minimal side of the story to date.

Please be advised that our clients have always made timely payment to Melanie with respect to any and all royalties which may be due her pursuant to their agreement.

At the moment, an outstanding dispute has arisen between the parties. As a result, the Schekeryks are maintaining that they are not under obligation to cause certain songs to be released for sale. We, of course, are maintaining that they are under such obligation and have withheld certain royalties pending resolution of such dispute.

This will advise you that we intend to file suit on behalf of our clients immediately. During pendency of such action we will be more than pleased to take such steps as will satisfy your offices that we intend to handle this matter in all good faith.

Please contact the undersigned.

Very truly yours,

Martin Garbus

MG:gw

341A

September 13, 1973

Martin Garbus, Esq.
Emil, Kobrin, Klein & Garbus
540 Madison Avenue
New York, N. Y. 10022

Dear Mr. Garbus:

I am writing to you on behalf of my clients, Melanie and Peter Schekeryk.

Peter Thall, Esq. has forwarded to me your letter to him of August 30, 1973. Mr. Lewis Bachman has forwarded to me your letters to him of August 29, 1973 and August 30, 1973.

In the above mentioned letters, you have proposed, on behalf of your clients, placing into an escrow account funds owed by your clients to Melanie. Please be informed that your suggestion is unacceptable to my clients.

Appropriate demand has previously been made for payment of royalties due to my clients, and I reiterate that demand on their behalf.

In your letter of August 30, 1973 to Mr. Bachman, you have also requested a copy of AGAC's contract with Melanie. Would you please inform me of the reason for this request.

Yours truly,

SF/gh

Ex. 2

American Guild of Authors and Composers

50 WEST 57th STREET, NEW YORK, N.Y. 10019 • Plaza 7-0833

ROYALTY COLLECTION PLAN
AUTHORIZATION

Gentlemen:

1. I agree to participate in the Plan for the collection of royalties.

2. The Plan includes the collection of royalties, the verification and processing of royalty statements, the payment to me of all royalties collected on my behalf less the charge referred to hereinafter, the maintenance of permanent records with respect to my royalties collected by you on my behalf, and the auditing, by independent accountants engaged by you, of books and records of publishers and others from whom royalties may be due to me or who maintain records which are directly or indirectly pertinent to royalties which may be or become payable to me.

3. The term "royalties" herein shall include all percentages, fees and sums relating to all types of rights and uses now or hereafter in existence, payable or which may be payable to me under contracts heretofore or hereafter entered into with publishers (whether or not on AGAC or SPA form) or parties other than publishers, with the exception of performing fees or royalties collected by ASCAP or BMI and sums and royalties collected through the Dramatists Guild.

4. In addition to the contracts already on file with you, I shall file with you the contracts or other papers on the basis of which collections are to be made for me, or necessary for that purpose.

5. A charge not exceeding four and one-half percent (4½%) of such aggregate royalties received by you on my behalf shall be deducted as and when the money is transmitted to me; but in no event shall such deduction exceed One Thousand Dollars ($1,000) for any one calendar year. I agree that, if any payments are made directly to me, or anyone on my behalf other than you, I shall immediately upon their receipt transmit to you an amount equal to four and one-half percent (4½%) of such payments which shall be deemed as included in such deduction, together with a copy of the statements received by me in connection with such payments.

6. Since this plan is maintained on behalf of other members as well as myself, and requires commitments for substantial expenses, I agree that my participation in the Plan shall continue for at least one year from the date hereof, and thereafter from year to year unless terminated by me by written notice addressed to you by registered mail no later than October 1st of any year, to become effective December 31st of that year. If you should, for any reason, determine to discontinue the Plan, you shall be entitled to do so on ninety (90) days' written notice addressed to all participants.

7. I hereby appoint the President, Treasurer and Executive Director of the Guild and each of them, as my attorneys-in-fact, on my behalf, with the powers set forthe below:

I authorize and empower each and all of my said attorneys-in-fact, on my behalf, in my name or in your and/or their names, (i) to demand, receive, collect, deposit and process all royalties which may be or become due and payable to me; (ii) to demand and receive all royalty statements and information which I shall be entitled to receive or which may be properly requested in respect thereof; (iii) to cause to be audited by independent accountants, all books, records and documents directly or indirectly pertinent to such royalties and statements, and (iv) to take, perform and institute any and all proper and lawful steps, acts and proceedings for or in relation to the aforesaid powers, and the implementation and enforcement of my contracts with publishers and others, and my contractual rights, in respect of the foregoing.

8. I agree to execute any and all authorizations and other documents which may be necessary or desirable, in the opinion of yourself and/or said attorneys-in-fact, to carry out the purposes hereof. The Council of the Guild shall have the right, in their judgment, from time to time to make reasonable rules and regulations which may be necessary or desirable to implement the Plan, and I agree to abide thereby.

9. Notwithstanding anything aforesaid, you will not collect or audit, on my behalf, any music publishing company of which I own 25% or more of the total issued and outstanding capital stock, except upon my written request.

10. The statements and information received by you under the Plan will be kept confidential, will be used only for the purpose of performing these services and will not be revealed without my consent.

Very truly yours,

Date: June 15, 1968

Member Melanie Safka

Safka

ACCEPTED:

Date: JUN 19 1968

AMERICAN GUILD OF AUTHORS & COMPOSERS

By: Miriam Sleeper

By: .....

(formerly SPA)
50 WEST 57th STREET
342A NEW YORK, N.Y. 10019

JUN 3 - 1983

QUESTIONNAIRE FOR PUBLISHERS

1. Name of Firm KAMA SUTRA MUSIC, INC. Phone No. 765-3320
2. Business Address 1650 BROADWAY - NYC
3. Form of Organization: (Corporation X, Partnership ____, Individual Proprietorship ____)
4. If a Corporation, state as follows:
   a. State of Incorporation NEW YORK
   b. List names of Directors HY MIZRAHI, ARTHUR RIPP, ARTHUR KASS, PHIL STEINBERG, ARNOLD FELDMAN
   c. List names of Officers HY MIZRAHI, ARTHUR RIPP, ARTHUR KASS, PHIL STEINBERG
5. If a Partnership, state as follows:
   a. General Partnership ____, or Limited Partnership ____
   b. List names of General Partners ____
   c. List names of Limited Partners ____
   d. State whether partnership certificate has been filed. Yes ____ No ____
   If so, where? ____
6. Are you affiliated with any other publishing organization, directly or indirectly?
   Yes X No ____
   a. If so, list each organization UNART MUSIC CORP.
7. Are you affiliated with any motion picture company, theatrical organization, radio broadcasting or record company, or other user of music, or with an orchestra leader, directly or indirectly? Yes X No ____
   a. If so, list each organization KAMA SUTRA RECORDS - BUDDAH RECORDS
8. Are you a party to any contract by which another person or corporation has an interest in songs to be published by you, or has a license to use those songs for any purpose? Yes X No ____
   a. If so, please explain fully CO-PUBLISHING AGREEMENT - UNART MUSIC CORP
9. Give two business references: X Bell Sound Studios
   London Records Production Co.
10. Give one banking reference: X Bankers Trust Co 47 Graham Ave Brooklyn
11. State how you clear performing rights BMI OK
12. Are you engaged exclusively in the publication of music? Yes ____ No X
    a. If not, state nature of other business RECORD PRODUCTIONS
13. Do you publish: Popular music X Production Music ____ Standard Music ____
14. List five most recent songs published:

	TITLE	COMPOSER	AUTHOR
1.	FINDERS KEEPERS	ROD McBRIEN	JOHN GIAMETTA
2.	JELLY JUNGLE	PAUL LEKA	SHELLEY PINZ
3.	LITTLE RED BOAT	PAUL LEKA	DENNIE GROSS
4.	FROM MY WINDOW	PAUL LEKA	JOSEPH REED
5.	I'LL MARRY THE SUN	LINDA LAURIE	

15. Do you employ writers under contract? Yes X No ____
    a. If so, please list name and address of each writer under contract:
16. Do you solicit from writers, by mail or otherwise, songs or lyrics for publication? Yes ____ No X
    a. If so, please annex specimen of mail or advertising solicitation.
17. Do you make any charge to writers for collaboration, publication or exploitation of songs? Yes ____ No X
18. Have you read the enclosed Basic Agreement between S.P.A. and Music Publishers? Yes X No ____
19. Please list names and official capacity of person or persons authorized to sign writers' contracts on your behalf:
    HY MIZRAHI ARTHUR KASS
    ARTHUR RIPP PHIL STEINBERG

JUN 19 1983

SIGNED: ____

...out the ... control of such licensing agent, and to permit SPA, by a duly authorized representative, to inspect, at the place

Copyright 1978 Songwriters' Protective Association

343A BASIC AGREEMENT

AGREEMENT made between AMERICAN GUILD OF AUTHORS AND COMPOSERS (formerly SPA), an unincorporated association (hereinafter referred to as "SPA"), party of the first part, and

(hereinafter referred to as the "Publisher"), party of the second part,

WITNESSETH:

In consideration of the sum of One ($1.00) Dollar and other good and valuable considerations, the receipt of which is hereby acknowledged, the parties agree as follows:

FIRST: SPA hereby approves for use by the Publisher during the term of this agreement, the form of 1947 Revised Uniform Popular Songwriters' Contract (hereinafter referred to as the "Revised Contract"), a copy of which is hereto annexed and made a part hereof, marked Exhibit A. The Publisher shall be entitled to note on any printed copies of said form (prepared without printed sections in the blank spaces) that said contract is the official form authorized by SPA for use by the Publisher.

SECOND: (a) The Publisher agrees to use said Revised Contract exclusively during the term hereof in connection with the acquisition of musical compositions (other than educational works) from members of SPA and to fulfill said contract in accordance with the terms thereof.

(b) The term "educational work" is limited to mean works compiled for musical instruction and arranged for and intended to be used by teachers and students of music, for the sole purpose of giving instruction in and studying music, and shall not include piano copies, standard works, dramatic-musical compositions or any other musical compositions intended to be sung, played or performed for any other purpose.

THIRD: No contract between a member of SPA and the Publisher relative to the acquisition or exploitation of a musical composition shall be valid or binding upon said member of SPA unless and until said contract shall have been countersigned by SPA, nor shall any modification or amendment of any contract, or anticipatory consent, or waiver of any of the terms or conditions thereof, be valid or binding upon said member of SPA unless and until the same shall have been reduced to writing, executed by the parties, and countersigned by SPA. SPA agrees to countersign such contracts when submitted to it by the Publisher, provided that such contracts comply and are not inconsistent with the terms hereof and the provisions of said Revised Contract. A synchronization license in the form agreed to by the parties hereto may, if executed by Publisher and Writer, form a part of the Revised Contract to be countersigned by SPA.

FOURTH: (a) The terms set forth in the Revised Contract are to be deemed minimum terms, and nothing herein or therein contained shall be deemed or construed to prevent or prohibit any individual writer from bargaining for or from receiving greater royalties or additional terms more favorable to said Writer than those contained in said Revised Contract. However, nothing herein contained shall be deemed or construed to require the Publisher to afford to the Writer terms more favorable than those contained in said Revised Contract.

(b) Should SPA enter into an agreement with any other publisher covering the subject matter hereof, upon terms more favorable to such other publisher, than the Publisher shall be entitled, upon thirty days' written notice, to adopt thereafter such more favorable agreement (but only in its entirety), whereupon such more favorable agreement shall be substituted for and supersede this agreement. The authorization of a more favorable form of Standard Uniform Popular Songwriter's Contract shall, for the purposes of this paragraph, be deemed a more favorable term of this agreement. SPA agrees to give to the Publisher notice of any agreement made by it with another publisher wherein the terms are different than those herein contained, and shall upon demand, furnish copies thereof to the Publisher.

(c) Should the Publisher acquire, during the term hereof, any musical composition (other than an educational work) from a member of SPA, under any contract, written or oral, the terms of which are less favorable than those provided in said Revised Contract, such contract shall be deemed void.

FIFTH: (a) Should the Publisher acquire a musical composition written by a member or members of SPA in collaboration with a non-member or non-members, the said Revised Contract shall be issued to all the writers thereof, but nothing herein or in said Revised Contract contained shall be deemed to prescribe any minimum royalty to be paid to any non-SPA member or members. The Publisher, in such case, shall, however, be required to pay to the SPA member at least that proportion of the minimum royalties and percentages provided in the Revised Contract as the number of SPA writers bears to the total number of writers of the composition. All other terms, provisions and conditions of the Revised Contract, other than royalties, shall be applicable to all the writers of the composition, SPA members and non-members alike.

(b) Should the Publisher acquire a musical composition from sources outside the United States (said composition not having been written by a member of SPA), and should a member of SPA, at the request of the Publisher thereafter provide an English lyric therefor, the SPA member's minimums shall be one-half of those set forth in the Revised Contract; provided, however, if the royalty rates payable by the Publisher to the foreign sources shall exceed one-half of the minimums set forth in the said Revised Contract, the SPA member's minimum shall be the larger of the following amounts: (i) the difference between the rates payable to the foreign sources and the minimums set forth in the Revised Contract, or 2½ per copy for regular piano copies sold and paid for in the United States and Canada, and one-fifth of the minimum percentages set forth in the Revised Contract.

(c) If the Publisher shall have acquired a musical composition of a member or members of SPA, under an agreement which provides that the rights acquired are subject to any rights of a third person, then the release to the Publisher shall not include such rights claimed by such third person, but shall extend to all rights acquired by the Publisher in such musical composition.

(d) If, however, such third person referred to in subdivision (c) hereof is a stage producer or motion picture company, then notwithstanding the provisions of subdivision (c) hereof, all such rights shall be released to the Publisher, if the composition (a) prior to its acquisition by the Publisher, been the subject of an agreement made independently of the Publisher, with the said stage producer or motion picture company, and if, in acquiring it, the Publisher is required to take the composition subject to the obligations therefore created by such independent contract, and if the Publisher's percentage of royalties in respect of the rights for which royalties are provided in the Revised Contract, does not, directly or indirectly, exceed 50% thereof, and the share of the said stage producer or motion picture company is not, directly or indirectly, in excess of one-half of the minimum percentages provided for in said Revised Contract. In such case, furthermore, the Revised Contract may provide that payment of the percentage to which the said stage producer or motion picture company is entitled, may be made directly by the Publisher to the said stage producer or motion picture company.

SIXTH: (a) The Publisher shall, upon written demand of SPA, cause any licensing agent, referred to in the Revised Contract, to furnish to SPA, statements showing in detail all licenses granted, uses had and payments made therefor, on all compositions acquired by the Publisher from members of SPA under the provisions hereof, for which licenses or permits were granted, or payments received, by or through any such licensing agent, and to permit SPA, by a duly authorized representative, to inspect at the place of business of such licensing agent, all books, records and documents of such licensing agent, relating thereto.

(b) The Publisher shall from time to time, upon written demand of SPA, furnish to SPA statements showing in detail all licenses granted, uses had and payments made therefor on all compositions acquired by the Publisher from members of SPA under the provisions hereof and for which licenses or permits were granted or payments received by the Publisher without the intervention of such licensing agent, and to permit SPA, by a duly authorized representative, to inspect, at the place

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of business of the Publisher, all books, records and documents relating to such compositions and all licenses granted, uses had and payments made thereof, such right of inspection to include, but not by way of limitation, the right to examine all original accountings and records relating to uses and payments by manufacturers of commercial phonograph records and music rolls.

(c) In the event that the Publisher shall fail or refuse, within sixty days after written demand, to furnish said statements or cause the same to be furnished, or to make available or cause to be made available, to SPA, as above provided, all [illegible] and documents, then the same shall be deemed to be a refusal to comply with the terms and conditions [illegible] certificate made by its members, as though each of said members shall have individually made such demand [illegible] Revised Contract, and with the same effect as if the refusal had been to the specific demand of the writer of each composition with respect to such composition.

(d) The written demands provided for herein shall be sent to the Publisher by registered mail.

SEVENTH: All of the terms and conditions agreed to between the Publisher and a member of SPA relative to any musical composition shall be set forth in writing as part of the Revised Contract, which upon execution by said member and the Publisher, shall be submitted by the Publisher to SPA for countersignature. The countersignature of a contract by SPA shall (subject to the provisions of paragraph Fifth, subdivision (c)) constitute a release and quit-claim of any right or interest acquired by the Publisher in the musical composition covered thereby theretofore assigned by the writer to SPA or to Ray Henderson, George W. Meyer and Jimmy McHugh as administrators, or to the successors in interest of such administrators.

EIGHTH: In the copyright law of the United States is hereafter amended by the repeal or revision of Section 1(e) thereof, SPA shall be entitled to terminate this agreement upon six months' written notice.

NINTH: If either of the parties hereto shall fail, refuse or neglect to perform the provisions of this agreement and such default shall continue for thirty days after receipt of notice by registered mail to repair the breach, then, in such event, the party not committing the breach shall have the right, at its or his option, to terminate this agreement, such option to be exercised by notice in writing by registered mail addressed to the party who has committed the breach.

TENTH: It is contemplated that a joint Industry Committee shall be appointed to consist of three members to be appointed by SPA and three members to be appointed by the Music Publishers' Protective Association, Inc. Should any dispute or question arise concerning the interpretation of any of the provisions of this agreement or of the Revised Contract either [illegible] by a publisher or a writer, the matter, with the consent of the Writer and the Publisher, may be submitted before such Joint Industry Committee. Either the Writer or the Publisher, however, shall be entitled to demand that the arbitration be held in accordance with the terms of the Revised Contract in lieu of arbitration before the Joint Industry Committee, except that if the demand for arbitration is made by SPA, the said controversy shall be arbitrated by the Joint Industry Committee. In the event, however, that the Publisher is not a member of Music Publishers' Protective Association, Inc., it shall be entitled to substitute publishers of its own designation for the publishers chosen by Music Publishers' Protective Association, Inc.

ELEVENTH: (a) This agreement shall be effective as of January 1, 1947, and shall continue until further notice unless terminated prior thereto in accordance with the terms hereof.

(b) All contracts heretofore made by the Publisher in respect to musical compositions acquired from members of SPA from and after January 1, 1947, and up to and including the date of execution of this agreement, shall be substituted, within thirty days from the date hereof, by an executed Revised Contract (dated as of the date of the original contract) and no variation of the terms of the Revised Contract shall be made except that (i) with regard to Section 4 (b) of the Revised Contract, subdivision (i) thereof shall prevail and neither the Publisher nor the Writer shall be entitled to demand, without the consent of the other, that the provisions of subdivision (ii) thereof be applied; and, (ii) any Revised Contract which is substituted for a contract made with a Writer between January 1, 1947 and April 30, 1948, may provide that the reversion to the Writer of rights in countries outside of the United States under the terms of Paragraph Eighth of the Revised Contract, will be subject to those foreign rights, if any, which the Publisher may have granted to a foreign publisher by the terms of an agreement made prior to April 30, 1948 provided that such agreement is listed in Schedule A hereto annexed and the pertinent portions are attached hereto; that each said substituted Revised Contract shall also designate the particular foreign publisher's agreement to which it is subject as herein provided, and provided further that the said Revised Contract shall provide that in the absence of the reversion of the said rights, the Writer shall, from and after the expiration of the period specified in Paragraph Eighth of the Revised Contract, be entitled to receive all royalties and other monies earned by the composition under the designated agreement, and the Writer shall, in all other respects, exercise all rights of the Publisher in the same manner and to the same effect as the Publisher could himself.

(c) With respect to musical compositions acquired by the Publisher from members of SPA from and after April 30, 1948, no variation of the Revised Contract shall be made. If prior to December 31, 1947 the Publisher entered into an agreement with a foreign publisher by the terms of which he has granted such foreign publisher foreign rights for a term beyond the expiration of the period specified in Paragraph Eighth of the Revised Contract, then the Publisher shall in good faith forthwith use reasonable efforts to cause said agreement to be amended or otherwise modified so as to provide for the reversion to the Publisher of all foreign rights and copyrights after the expiration of the period specified in Paragraph Eighth of the Revised Contract. However, if the foreign publisher shall refuse to agree to such amendment or change, then, and with respect only to musical compositions acquired by the Publisher from members of SPA from and after April 30, 1948 and prior to April 30, 1950, the Revised Contract with respect to such compositions may provide that the reversion to the Writer of rights in countries outside the United States under the terms of Paragraph Eighth of the Revised Contract will be subject to those foreign rights, if any, which the Publisher may have granted to a foreign publisher by the terms of such agreement made prior to December 31, 1947, provided: that said agreement is listed in Schedule B hereto annexed and the pertinent portions are attached hereto; that each such Revised Contract shall also designate the particular foreign publisher's agreement to which it is subject as herein provided and provided, further, that the said Revised Contract shall provide that, in the absence of the reversion of the said rights, the Writer shall, from and after the expiration of the period specified in Paragraph Eighth of the Revised Contract, be entitled to receive all royalties and other monies earned by the composition under the designated agreement, and the Writer shall, in all other respects, exercise all rights of the Publisher in the same manner and to the same effect as the Publisher could himself.

(d) The Publisher shall execute any and all documents and do any and all acts and things necessary to vest in the Writer the rights vested in this Paragraph Eleventh.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this [illegible] day of JUN 19 1950 19[illegible]

AMERICAN GUILD OF AUTHORS AND COMPOSERS

By [signature] (L.S.)

Publisher [illegible]

By [signature]

Copyright 1948 Songwriters' Protective Association

- 345A October 27, 1970

Mr. Alex Jolicoeur
Kama Sutra Music, Inc.
1650 Broadway
New York, N.Y. 10019

Re: MELANIE SAFKA

Dear Mr. Jolicoeur:

The above named individual is a member of AGAC and as such all royalties should be remitted to us. Enclosed herewith is a signed authorization to collect in her behalf.

We would appreciate copies of any previous royalty statements submitted directly to the writer.

Thank you for your cooperation.

Yours truly,

Saul R. Maslan

SRM:od
enc.

Copy of statement
rec'd 11/2/70

Ex. 5

346A

September 13, 1973

Martin Garbus, Esq.
Emil, Kobrin, Klein & Garbus
540 Madison Avenue
New York, N. Y. 10022

Dear Mr. Garbus:

I am writing to you on behalf of my clients, Melanie and Peter Schekeryk.

Peter Thall, Esq. has forwarded to me your letter to him of August 30, 1973. Mr. Lewis Bachman has forwarded to me your letters to him of August 29, 1973 and August 30, 1973.

In the above mentioned letters, you have proposed, on behalf of your clients, placing into an escrow account funds owed by your clients to Melanie. Please be informed that your suggestion is unacceptable to my clients.

Appropriate demand has previously been made for payment of royalties due to my clients, and I reiterate that demand on their behalf.

In your letter of August 30, 1973 to Mr. Bachman, you have also requested a copy of AGAC's contract with Melanie. Would you please inform me of the reason for this request.

Yours truly,

SF/gh

Ex. 6

347A

SANDOR FRANKEL
ATTORNEY AT LAW
520 BROADWAY
NEW YORK, N.Y. 10007
(212) 227-6666

September 26, 1973

Kama Rippa Music, Inc.
Kama Sutra Music, Inc.
810 Seventh Avenue
New York, New York 10019

Re: Melanie Safka Schekeryk

Gentlemen:

Pursuant to your agreement with my client, Melanie Safka Schekeryk, dated as of the 31st day of May, 1968, and in view of your failure to remit royalty statements and payments due and owing to Melanie Safka Schekeryk after due demand therefor was made, please be advised that all rights in and to all compositions delivered to you by Melanie, including but not limited to all copyrights therein and all renewal copyrights therein (together with the worldwide administration rights thereto), have reverted to Melanie throughout the world in their entirety.

This letter will serve as my client's demand that all documents, files, copyright certificates, copies of sub-publishing agreements and license agreements of every type and nature affecting and relating to the aforesaid compositions be delivered to the undersigned on behalf of Melanie Safka Schekeryk forthwith.

In addition to the above, we hereby reiterate all demands for royalty payments due and owing to Melanie.

Ex. 7

This letter shall also serve as my client's demand that you remit in full all moneys received by you or by your affiliates for or on behalf of or with respect to Melanie and the aforesaid compositions after the date hereof.

Very truly yours,

SF/mr

SANDOR FRANKEL

REGISTERED MAIL
RETURN RECEIPT REQUESTED

cc:
REGISTERED MAIL
RETURN RECEIPT REQUESTED

Emil, Kobrin, Klein & Garbus, Esqs.
540 Madison Avenue
New York, New York 10022

ASCAP
1 Lincoln Plaza
New York, New York 10023

Buddah Records, Inc.
810 Seventh Avenue
New York, New York 10019

Joseph Zynczak, Esq.
c/o Kurtz & Vassallo
598 Madison Avenue
New York, New York 10022

Mr. Robert Reno
Midland Music, Inc.
50 West 57th Street
New York, New York 10019

cc:
REGISTERED MAIL
RETURN RECEIPT REQUESTED

American Guild of Authors & Composers
50 West 57th Street
New York, New York 10019

The Harry Fox Agency, Inc.
110 East 59th Street
New York, New York 10022

cc:

Mr. Isidor Schachter

Mrs. Melanie Safka Schekeryk

Mr. Peter Schekeryk

Casper & Thall, Esqs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

--and--

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

AFFIDAVIT

73 Civ. 3789

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

MELANIE SCHEKERYK, being duly sworn, deposes and says:

1. I am a defendant and counterclaimant in this action. I respectfully submit this affidavit in support of my motion for summary judgment on the second, third, and fifth counterclaims which I have asserted against Kama Rippa Music, Inc. ("Kama Rippa").

2. I have read the moving affidavit and the reply affidavit of Sandor Frankel, my counsel, in support of this motion. The statements in both of said affidavits are true and complete, and I respectfully adopt each of them by reference herein.

3. I have been informed that the president of Kama Rippa, Mr. Arthur Kass, claims that I "waived" my right to timely payment of royalties and my further right to reversion of the copyrights in the event of Kama Rippa's default. I wish most respectfully to inform the Court that I never "waived" any of said rights; in my letter to Mr. Kass of April 18, 1973, in which I withdrew my previous claim for reversion of the copyrights (which had resulted from Kama Rippa's default for the semi-annual period ending December 31, 1972) because Kama Rippa refused otherwise to pay me the royalties then due, I specifically informed Kama Rippa:

> "We further reserve our rights in the future to invoke the said rider to Paragraph 6 of our Agreement of May 31, 1968, in the event future royalties and statements are not tendered when due." (A copy of this letter is annexed as Exhibit 14 to my counsel's moving affidavit.)

In addition, I most respectfully refer the Court to the numerous other instances in which the American Guild of Authors and Composers (my authorized representative) and my counsel demanded timely payment of royalties and clearly informed Kama Rippa of my intention to invoke the reversion clause if Kama Rippa continued in its default; my counsel's moving affidavit and reply affidavit have brought these

matters accurately to the Court's attention.

4. I am informed that Kama Rippa has claimed that I was not "prejudiced" by its default in failing until November 27, 1973 to pay the royalties which they owed to me. I respectfully submit that Kama Rippa's obligation to pay me timely royalties, and my right to reversion of the copyrights in the event of Kama Rippa's default, is in no way contingent upon my suffering "prejudice" from Kama Rippa's default. However, although I believe it to be irrelevant to my application for reversion of the copyrights, I wish most respectfully to inform the Court that my livelihood is derived substantially from royalty payments. Because Kama Rippa refused to pay me my royalty payments on time for the period January 1, 1973 through June 30, 1973, my husband and producer (Peter Schekeryk) and I were required to apply to Paramount Records for a substantial advance on royalties; we were unable to meet payment on an outstanding bank loan at the Manufacturers Hanover Trust (which has since been repaid); we were forced to cancel and re-schedule several recording sessions because of inability to pay the studio; we were unable to make timely payments to union musicians; and we were unable to make timely payments to other creditors. The effect that all of this has had and will have on my credit and on my career is difficult to evaluate in dollars.

5. I wish also respectfully to inform the Court that Kama Rippa's Complaint in this action, in which Kama Rippa

claims that I am required to "release" for public distribution three demonstration records under the terms of the Agreement Regarding Remaining Songwriting Obligations, is absolutely false. As that agreement clearly states, I was required to deliver twenty additional musical compositions and to provide records of three of those twenty for Kama Rippa's use in developing the copyrights. I performed these obligations fully and timely. Nowhere does said agreement require me to "release" the three demonstration records to the record-buying public. The words "record" and "release" are separate and distinct terms which carry with them separate and distinct obligations; and I respectfully submit that my agreement with Kama Rippa does not require me to cause the "release" of the three demonstration records to the record-buying public.

6. For these reasons, and for the additional reasons stated in my counsel's moving and reply affidavits and in my counsel's original and reply memoranda of law, I most respectfully request that the Court grant my motion for summary judgment on the second, third, and fifth counterclaims.

Sworn to before me this

day of January, 1974. _____

Melanie Schekeryk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

--and--

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

- -x

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AFFIDAVIT

73 Civ. 3789

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

PETER SCHEKERYK, being duly sworn, deposes and says:

1. I am a defendant and counterclaimant in this action. I respectfully submit this affidavit in support of the motion of Melanie Schekeryk for summary judgment on the second, third, and fifth counterclaims which she has asserted against Kama Rippa Music, Inc. ("Kama Rippa").

2. I have read the moving affidavit and the reply affidavit of Sandor Frankel, my counsel, in support of this motion. The statements in both of said affidavits are true and complete, and I respectfully adopt each of them by reference herein.

3. I have been informed that the president of Kama Rippa, Mr. Arthur Kass, claims that Melanie's right to timely payment of royalties, and her right to reversion of the copyrights in the absence of timely payment, have been "waived". I wish most respectfully to inform the Court that neither Melanie nor I ever "waived" these rights; in Melanie's letter to Mr. Kass of April 18, 1973, in which she withdrew her previous claim for reversion of the copyrights (which had resulted from Kama Rippa's default for the semi-annual period ending December 31, 1972) because Kama Rippa refused otherwise to pay her the royalties then due, Melanie specifically informed Kama Rippa:

> "We further reserve our rights in the future to invoke the said rider to Paragraph 6 of our Agreement of May 31, 1968, in the event future royalties and statements are not tendered when due." (A copy of this letter is annexed as Exhibit 14 to my counsel's moving affidavit.)

In addition, I most respectfully refer the Court to the numerous other instances in which the American Guild of Authors and Composers (Melanie's authorized representative) and our counsel demanded timely payment of royalties and clearly informed Kama Rippa of the intention to invoke the reversion clause if Kama Rippa continued in its default; my

counsel's moving affidavit and reply affidavit have brought these matters accurately to the Court's attention.

4. I am informed that Kama Rippa has claimed that Melanie was not "prejudiced" by Kama Rippa's default in failing until November 27, 1973 to pay the royalties which they owed to Melanie. I respectfully submit that Kama Rippa's obligation to pay Melanie timely royalties, and Melanie's right to reversion of the copyrights in the event of Kama Rippa's default, is in no way contingent upon Melanie having suffered "prejudice" from Kama Rippa's default. However, although I believe it to be irrelevant to Melanie's application for reversion of the copyrights, I wish most respectfully to inform the Court that our livelihood is derived substantially from royalty payments. Because Kama Rippa refused to make timely royalty payments for the period January 1, 1973 through June 30, 1973, Melanie and I were required to apply to Paramount Records for a substantial advance on royalties; we were unable to meet payment on an outstanding bank loan at the Manufacturers Hanover Trust (which has since been repaid); we were forced to cancel and re-schedule several recording sessions because of inability to pay the studio; we were unable to make timely payments to union musicians; and we were unable to make timely payments to other creditors. The effect that all of this has had and will have on our credit and on Melanie's career is difficult to evaluate in dollars.

5. I wish also respectfully to inform the Court that Kama Rippa's Complaint in this action, in which Kama Rippa claims that Melanie is required to "release" for public distribution three demonstration records under the terms of the Agreement Regarding Remaining Songwriting Obligations, is absolutely false. As that agreement clearly states, Melanie was required to deliver twenty additional musical compositions and to provide records of three of those twenty for Kama Rippa's use in developing the copyrights. Melanie performed these obligations fully and timely. Nowhere does said agreement require her to "release" the three demonstration records to the record-buying public. The words "record" and "release" are separate and distinct terms which carry with them separate and distinct obligations; and I respectfully submit that Melanie is not required to cause the "release" of the three demonstration records to the record-buying public.

6. For these reasons, and for the additional reasons stated in my counsel's moving and reply affidavits and in my counsel's original and reply memoranda of law, I most respectfully request that the Court grant Melanie's motion for summary judgment on the second, third, and fifth counterclaims.

Sworn to before me this

day of January, 1974.

Peter Schekeryk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

-and-

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

358A

REPLY TO COUNTERCLAIMS

Civil Action No. 73 CIV. 3789

Plaintiff, KAMA RIPPA MUSIC, INC., by their attorneys, Emil, Kobrin, Klein & Garbus, replying to the counterclaim of defendants as follows:

1. Lacks information sufficient to form a belief as to the truth or falsity of those allegations contained in paragraph 19 of the Answer and Counterclaim herein.

2. Denies the allegations contained in paragraphs 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 of the Answer and Counterclaim except admits that agreements were entered into on May 31, 1968 and August 24, 1971 and would respectfully refer this Court to the entire agreements for the terms thereof.

3. Denies each and every allegation contained in paragraphs 34 and 35 of the Answer and Counterclaim herein and would state further that there is no question of actual controversy existing between the parties.

4. Denies each and every allegation contained in

paragraph 37 of the Answer and Counterclaim herein.

5. Denies each and every allegation contained in paragraphs numbered 38, 40, 41, 42, 43, 44, 45, 46 and 47 of the Answer and Counterclaim herein except admits the existence of agreements dated May 31, 1968 and would respectfully refer this Court to said agreements for the full terms thereof.

6. Denies each and every allegation contained in paragraphs 93, 94, 95, 96, 97, 98, 99 and 100 of the Answer and Counterclaim herein except admits that plaintiff herein did obtain an order of attachment in Supreme Court of the State of New York, at Special Term, Part II thereof, on or about September 17, 1973.

7. Denies each and every allegation contained in paragraphs numbered 101, 102 of the Answer and Counterclaim herein.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE TO THE FIRST COUNTERCLAIM HEREIN

8. The first counterclaim fails to state a claim against the plaintiff upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE TO THE FIRST COUNTER-CLAIM HEREIN

9. Plaintiff herein has delivered all monies to Melanie Schekeryk or Peter Schekeryk or Amelanie Music to date hereof.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE TO THE SECOND COUNTER-CLAIM HEREIN

10. The second counterclaim fails to state a cause of action against plaintiff as there is no question of actual controversey between the parties.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE TO THE THIRD COUNTER-CLAIM HEREIN

11. The third counterclaim herein fails to state a cause of action against plaintiff herein upon which relief can be granted.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE AS AGAINST THE FOURTH COUNTERCLAIM HEREIN

12. The fourth counterclaim herein fails to state a cause of action upon which relief can be granted.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE TO THE FIFTH COUNTER-CLAIM AGAINST PLAINTIFF.

13. Fifth counterclaim herein fails to state a cause of action against plaintiff upon which relief can be granted.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE AGAINST THE SIXTH COUNTER-CLAIM

14. The sixth counterclaim herein fails to state a cause of action against plaintiff upon which relief can be granted.

WHEREFORE, plaintiff demands judgment on the complaint and dismissing all counterclaims as against plaintiff, together with costs and disbursements of this action including counsel fees.

EMIL, FORKIN, KLEIN & CARBUS
Attorneys for Plaintiff
Office & P.O. Address
540 Madison Avenue
New York, N. Y. 10022
Tele. No. (212) 688-6040

LONDON RECORDS, INC. / KAMA-SUTRA RECORDS, IN
KAMA-SUTRA MUSIC CO., INC. / KAMA-RIPPA MUSIC, IN
1619 BROADWAY, NEW YORK, NEW YORK, 10019 / PHONE (212) 582-09

January 4, 1971

Miss Melanie Safka
651 Second Avenue
Long Branch, New Jersey

Re: Songwriter's Agreement
of May 31, 1968

Dear Melanie:

Reference is hereby made to Paragraph 14 of our Agreement dated May 31, 1968.

As you know, Paragraph 14 of our Agreement provides that you will be delivering to us a minimum of twenty (20) wholly written compositions during each year of the term of our agreement with you. We are now in the final year of our agreement and our records indicate, after giving due consideration to the compositions that had to be assigned to the Estates of A. A. Milne and H. Fraser Simpson, that you have delivered to us approximately forty-five (45) compositions. This is about fifteen (15) short of the minimum number of compositions that you must deliver to us by May 31, 1971 and one of the purposes of this letter is to put you on notice that it is our intent to hold you to this delivery requirement.

Our records also indicate that you have not delivered to us several of the compositions written by you though oral demand for same has been made several times. Accordingly, demand is hereby made upon you to provide us with the words and music for the following compositions: "Baby Rainbow", "Going Fishing" and "20th Progression". A tape recording containing the music written by you for the foregoing songs and lyric sheets for same would be sufficient enough to enable us to

Encl

The Kama Sutra Group
BUDDAH RECORDS, INC./ KAMA-SUTRA RECORDS, INC.
BUDDAH MUSIC, INC. / TENDER-TUNES MUSIC CO., INC. / KAMA-SUTRA MUSIC CO., INC. / KAMA-RIPPA MUSIC, INC.
1650 BROADWAY, NEW YORK, NEW YORK, 10019 / PHONE (212) 582-0550

have a professional copyist make lead sheets for same.

I request that you deliver the foregoing three (3) compositions to us within seven (7) days as of the date of this letter, inasmuch as we need this material to complete the Melanie Songbook, which has been in preparation as you know, since the middle of May, and any further delay in providing these materials to us on your part will cause a further loss of profits on our part and damage us greatly.

Very truly yours,

KAMA RIPPA MUSIC, INC.

By _____
NEIL BOGART, PRESIDENT

NB:da

cc: H. Beldock, Esq.
R. Casper, Esq. ✓

bcc: J. Bronston, Esq.
M. Garbus, Esq.
L. Pierez

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

BUDDAH RECORDS, INC. / KAMA-SUTRA RECORDS, INC.
BUDDAH MUSIC, INC / TENDER-TUNES MUSIC CO., INC. / KAMA-SUTRA MUSIC CO., INC / KAMA-RIPPA MUSIC, INC.
1650 BROADWAY, NEW YORK, NEW YORK, 10019 / PHONE (212) 582-0580

363A May 27, 1971

Melanie Safka
c/o Robert Casper, Esq.
1780 Broadway
New York, New York 10019

Dear Melanie:

Reference is hereby made to Paragraph 14 of our Exclusive Songwriter's Agreement dated May 31, 1968.

According to the terms and conditions of Paragraph 14, you were to deliver to us a minimum of twenty (20) wholly owned compositions per each year, however, the number of compositions to be delivered under our agreement could be averaged over the entire term of our agreement. Accordingly, your minimum delivery requirement to us constituted sixty (60) wholly owned compositions.

Our records indicate, that to date, you have delivered only thirty-five (35) compositions. Therefore, you still have an obligation to deliver to us twenty-five (25) compositions. Please be advised that we consider our agreement of May 31, 1968, as being in full force and effect, until such time you deliver to us all those compositions owned by you to us, notwithstanding the fact that chronologically, our agreement was scheduled to end on May 31, 1971.

Nothing herein contained shall constitute a waiver of any of our rights at law, equity or otherwise.

Very truly yours,

KAMA RIPPA MUSIC, INC.

By _____

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Another Side of Melanie

364 A



Exh. 11

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

_ 365A

Index No. 16516/73

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE TO VACATE ORDER OF ATTACHMENT AND LEVIES THEREUNDER

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT L. CASPER being duly sworn, deposes and says:

1. I am a member of the firm of Casper & Thall, P. C., General Counsel for defendants, Ms. Melanie Schekeryk, Mr. Peter Schekeryk, individually and d/b/a Amelanie Music. I submit this Affidavit in support of the motion to vacate the Order of Attachment and Levies thereunder.

2. I am an attorney licensed to practice in the State of New York and have practiced law and, particularly, general entertainment and music law, in the City of New York for more than fifteen (15) years. During this time, I have represented hundreds of clients, including hundreds of songwriters, recording artists and music publishing companies; among which, have been and are included many of the most commercially and artistically successful musical artists/in the world. publishing and recording companies

3. Prior to August 24, 1971, I, on behalf of the defendants, participated in the discussions with plaintiff, resulting in the preparation and execution of the letter agreement regarding Melanie Schekeryk's remaining songwriting obligations referred to in such agreement, dated August 24, 1971. During the

course of these discussions which were reflected in the agreement which was executed (and which was drafted by plaintiff's counsel, Joseph E. Zynczak, Esq.), there was never any contemplation of the release of the recordings frequently referred to in said agreement.

4. In my experience in the entertainment industry, and particularly, the publishing and recording industry, the words "record" and "release" have two (2) entirely separate meanings. The differences between such words are often the cause of extended, protracted and sometimes even heated negotiations. The word "record" has always been intended to mean, in my experience, and without exception, the actual production onto tape of a sound recording containing the performance of one (1) or more individual vocalists and/or instrumentalists. The word "release" has always been intended to mean, in my experience, and without exception, the general distribution into commerce of phonograph records derived from the master sound recordings to which I have just referred.

5. In the context of music publishing, the word "record" is used to mean the recording of a performance of either the writer or studio musicians for purposes of producing a demonstration tape, which is then duplicated by the music publisher and presented to recording artists, record companies and producers with a view toward causing the musical composition (which is the only asset acquired by the music publisher) to be subsequently recorded. It is through this process that music publishers gain exploitation of their compositions.

6. Accordingly, the reason that the plaintiff sought to have Melanie record three (3) of the twenty (20) compositions was to obtain a particularly valuable demonstration tape containing the performance of a major international songwriter and recording artist, the receipt of which by other recording artists, record companies and producers would not only be appreciated and valued but would receive their specific attention, particularly when one considers that major recording artists, recording companies and producers receive hundreds of such demonstration tapes containing the performances of studio musicians of musical compositions authored by unknown writers over the years. It would have been very easy for the plaintiff's own counsel, or the plaintiff's principals, to propose, and conceivably to demand that the word "record" used in the said agreement be changed to "release". However, a mere reading of the August 24, 1971 agreement shows that the parties contemplated and agreed upon the mere "recording" and not "release" of the three (3) musical compositions. The word "release" or any such similar phrase denoting distribution to the general record buying public, nowhere appears in the agreement.

ROBERT L. CASPER

Sworn to before me this
16th day of October, 1973.

Notary Public

PETER M. THALL
Notary Public, State of New York
No. 31-9310645
Qualified in New York County
Commission Expires March 30, 1974

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- x

KAMA RIPPA MUSIC, INC., : 368A

Plaintiff, :

-against- : AFFIDAVIT

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC, : Index No. 16516/73

Defendants. :

- x

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

FREDERICK WEINBERGER, being duly sworn, deposes and says:

1. I am counsel to the Sheriff of the City of New York.

2. I have caused a search to be made of the records of the Office of the Sheriff of the City of New York in connection with the Order of Attachment issued and subsequently vacated in the above-captioned matter. As a result of said search, I hereby depose and state that:

(a) Kama Rippa Music, Inc., which was served with the Order of Attachment as "garnishee", has not served upon the Sheriff a statement specifying its debt to the defendants or any property of the defendants in its possession or custody in which defendants had an interest at the time of said Order of Attachment;

Ex B

(b) Kama Rippa Music, Inc. has not delivered to this Office any moneys or property owed by Kama Rippa Music, Inc. to the defendants or purportedly being held by Kama Rippa Music, Inc. pursuant to the Order of Attachment referred to above.

Sworn to before me this
8th day of January, 1974.

FRANCES T. STONE
Notary Public, State of New York
No. 03-3860950
Qualified in Bronx County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

KAMA RIPPA MUSIC, INC.,

Plaintiff,

- against -

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

- -x

- 370A

ORDER

73 Civ. 3789

This action was commenced by plaintiff on August 31, 1973, and service was effected on September 20. On October 10, the last appropriate day, defendants served their answer, which contained a counterclaim, by placing it appropriately addressed in the United States mails. On the following day, unaware that the answer had been served, plaintiff filed a notice of voluntary dismissal which was "So ordered" by the Court on October 15.

The present motion is by the defendants to vacate such dismissal on the ground that the notice upon which it was based is a nullity, the answer having been served before it was filed (Fed. R. Civ. P. 5(b)).

On oral argument, plaintiff conceded that his notice to dismiss was, as a technical matter, a nullity; and defendants consented that the motion be treated as one

by the plaintiff for permission to dismiss the action. (Rule 41(a)(2)). With matters in that posture it becomes incumbent upon plaintiff to persuade the Court that it should exercise its discretion in plaintiff's favor. Voluminous documents have been submitted, and the controlling facts do not emerge with crystal clarity. Suffice it to say that plaintiff has not born the burden of persuading the Court that it should act. For the foregoing reason the defendants' motion to vacate the order of dismissal is granted and the substituted motion by the plaintiff for a discretionary order dismissing the complaint is denied.

SO ORDERED.

Dated: New York, New York
November 16, 1973.

WHITMAN KNAPP, U.S.D.J.

November 16, 1973

Hon. Jacob Markowitz
Justice of the Supreme Court
60 Centre Street
New York, New York 10007

Re: Kama Rippa Music, Inc. v. Schekeryk, et al.
Index No. 16516/1973

Dear Judge Markowitz:

I am in receipt of the affidavit of plaintiff's counsel submitted in opposition to my affidavit in support of attorney's fees. Although I hesitate to dignify its contents by responding, certain of its allegations are sufficiently scurrilous that some response is necessary.

The affidavit of plaintiff's counsel claims that the total time devoted by plaintiff's counsel on the motion to vacate was 31 hours (¶ 3). On October 2, 1973, plaintiff's counsel and I appeared before the Hon. Mary Margaret Mangan for oral argument of the motion to vacate. Plaintiff's counsel requested an adjournment from Judge Mangan on the grounds that four attorneys in the office of plaintiff's counsel had been working full-time for the previous three days in responding to defendants' moving papers and counsel required another week to prepare opposing papers. (Judge Mangan granted the adjournment requested by plaintiff's counsel, and we therefore appeared before Your Honor one week later.)

Plaintiff's counsel expresses bewilderment at the $50.00 per hour rate charged by an attorney "with a downtown office in a low rent area" (¶ 4). I need only say that our offices are in the close vicinity of Manhattan's State and

Federal courthouses because of the litigation nature of our practice; the basis on which plaintiff's counsel speculates as to our rental is rather beyond me.

Plaintiff's counsel states that I am attempting "double billing," and am attempting to "soak" plaintiff and "pad" the amount requested, in view of the pending Federal case (¶¶ 3, 5, 15). I can assure Your Honor that my affidavit previously submitted was confined exclusively to hours spent solely on account of the motion to vacate. Not a penny of these fees is attributable to the pending Federal action, for which my clients have been charged an entirely separate fee.

Plaintiff's counsel states that I have been admitted to the Bar for "only three or four years" and am "inexperienced" (¶¶ 11, 12). I have been a member of the Bar for approximately six years; I have previously served as counsel on a White House Task Force, as counsel to a national committee which re-wrote Title 18 of the United States Code for submission to the United States Congress, as an Assistant United States Attorney, and as an associate in the Wall Street law firm of Fried, Frank, Harris, Shriver & Jacobson (formerly Strasser, Spiegelberg, Fried, & Frank). As previously stated, the hourly rate reflected in my affidavit is based on a long-standing fee agreement with my clients which has been in effect for over two years.

The affidavit of plaintiff's counsel states that the matter heard and decided by Your Honor was "a mere motion" (¶ 4). The motion to vacate, for reasons previously stated in our moving papers, will have a determinative impact on the pending Federal action for reversion

of copyrights which plaintiff's counsel has previously estimated to be worth in excess of $400,000.00. We were not simply engaging in an academic exercise by litigating the motion to vacate the order of attachment.

Respectfully yours,

SF/mr

SANDOR FRANKEL

cc: Emil, Kobrin, Klein & Garbus, Esqs.
540 Madison Avenue
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

-and-

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Third Party Plaintiffs, (Counterclaimants)

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC. and BUDDAH RECORDS, INC.,

Third Party Defendants, (Counterdefendants)

----------x

375A

SUPPLEMENTARY AFFIDAVIT IN OPPOSITION TO CROSS-MOTION FOR SUMMARY JUDGMENT ON THE SECOND, THIRD AND FIFTH COUNTERCLAIMS

Civil Action No. 73 Civ. 3789

(JUDGE KNAPP)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HARLEY I. LEWIN, being duly sworn, deposes and says:

1. I am associated with the firm of Emil, Kobrin, Klein & Garbus and make this affidavit in reply to the Reply Affidavit In Support of Cross-Motion For Summary Judgment by Sandor Frankel dated January 10, 1974.

2. Oral argument has been had in this case before this Court on January 11, 1974. Your deponent believes that a great bulk of the issues presented to this Court were clarified during such argument. However, certain of the issues before the Court as raised by defendants' counsel both in the aforesaid Reply Affidavit and during oral argument, require response by your deponent.

3. It is imperative to note at the outset that the main contention of plaintiff that the Publishing and Songwriting Agreements between the parties must be read together with the Publishing Settlement Agreement between the parties has not been refuted by defendants and in fact has been admitted by defendants in their answering papers and in the Reply Affidavit of Sandor Frankel in paragraph 2(d).

4. Defendants contend that there is no material question of fact. They fail to put forth any affidavits by the parties other than the two annexed as Exhibit "8" to Frankel's affidavit which refutes in any manner the belief that plaintiff holds that defendants were required to release for sale to the public three of the twenty compositions delivered by Melanie tc plaintiff pursuant to the Publishing Settlement Agreement. It is plaintiff's contention that Melanie's refusal to release such compositions constituted a prior breach of the Publishing and Songwriting Agreements with Kama Rippa and as a result thereof Melanie cannot now enforce the reversionary clause forming the subject matter of the summary judgment motion herein. As a

result (although defendants' counsel attempts to avoid this by stating the matter as a conclusion and by totally avoiding raising it as a material issue in his Reply Affidavit) this Court must hear evidence regarding the clear ambiquity surrounding the obligations of the parties pursuant to these agreements. For this reason alone, the summary judgment motion must fail.

5. There are several other contentions and misstatements which must be clarified herein.

6. Defendants' counsel states that plaintiff has dealt with the AGAC with respect to Melanie's royalties before and seems to imply therefrom that we, therefore, should have recognized AGAC's demand when made for payment of royalties. This is a clear misstatement of the relationship between the parties. Payment of royalties was due pursuant to a publishing agreement. The AGAC does not represent publishers, rather, it represents songwriters. The agreement between the AGAC and Melanie (annexed as an exhibit to the Frankel affidavit) clearly contemplates royalty payments being made on behalf of a songwriter pursuant to songwriting agreements. This is precisely why Kama Rippa (a) is not a signatory to the AGAC agreement and (b) has never recognized the AGAC as a publisher's representative. Although Melanie is a signatory to the agreement with Kama Rippa, a brief perusal of the agreement clearly contemplates demand by Melanie. The agreement does not contemplate a payment by an "authorized representative" inasmuch as these words are specifically omitted. In addition, no refutation has been made by defendants of plaintiff's description of the confusing nature of

the demands made by the variety of parties purporting to represent the defendants. Plaintiff firmly believes, therefore, that the demand of the AGAC was of no force and effect.

7. In addition, although defendants' counsel in paragraph 2(k) of his Reply Affidavit states that there is no material dispute with respect to the facts surrounding the decision and opinion of Judge Markowitz in New York State Court regarding the Order of Attachment secured therein, plaintiff would contend that there are major disputes. In particular, plaintiff would note the extensive argument presented in this Court with respect to plaintiff's position that Judge Markowitz's ruling was despositive of a number of arguments raised by defendants herein including (a) the argument that the plaintiff had abused process, (b) the argument that defendants were prejudiced in any manner and (c) the argument that defendants are entitled to certain punitive and exemplary damages including counsel fees. We would further note that defendants misread the decision of Judge Markowitz. Judge Markowitz refused to rule on the question of counsel fees when it was entirely proper to do so and did not turn the matter over to the Federal Court. Rather, Judge Markowitz based his decision on narrow grounds in effect deciding and rejecting a variety of other arguments presented by the defendants which are being repeated herein.

8. The element of waiver raised by plaintiff and responded to by defendants cannot be fully decided or heard by

this Court unless evidence is heard on the dealings between the parties. This need is in no way refuted by defendants' counsel's statement and is not dealt with in the affidavits by Melanie and Peter Schekeryk.

9. Plaintiff contends that a hearing regarding the prior dealings between the parties will effectively show that defendants waived their rights on an ongoing permanent basis to enforce the reversionary clause. Defendants contend that the agreements between the parties provides for non-waiver. It is clear that such a statement in the agreements is mere boiler-plate and that any agreement involving such non-waiver statements can be modified by the dealings between the parties. This is precisely the import of plaintiff's statements regarding this issue. This Court must hear evidence on such issue before making a decision. The contention that the plaintiff was required to raise such an issue in its answering papers is frivolous. Plaintiff could move to amend. However, it is noteworthy that defendants seem to have unilaterally waived the "9(g) statement" required. If this Court permits this matter to move forward without such required statement it would seem equally permissible for the element of waiver to be raised without having it first been raised by answer.

10. Plaintiff would note as well that it did not intend and does not intend to "tacitly admit" anything with respect to its right to withhold royalties by payment thereof. Melanie and Peter were pleading poverty. Plaintiff, upon the vacating of the Order of Attachment, paid what monies it held over to

defendants as a courtesy. Defendants' counsel's numerous contentions in his Reply Affidavit regarding such payment being an admission of some sort is simply frivolous. In addition, it should be noted that, despite the legal right of the Sheriff of the City of New York to actually have monies transmitted to him which are levied upon, the general practice is that no such transmission actually takes place to the Sheriff unless specifically requested by one of the parties or the Court. Normally, the Sheriff levies and the funds are locked up and a further report is made to the Sheriff saying which funds are being held. The Sheriff rarely enforces the requirement to immediately transmit such funds to him and the lateness of such transmission is not despositive of any issue in this Court. This is simply a smoke screen raised by defendants which has no force or effect on the issues herein.

11. In paragraph 23 of Frankel's affidavit he makes another misstatement. Frankel states that Kama Rippa's obligations to pay royalties on a timely basis was unconditional. This Court is respectfully referred to deponent's original affidavit in opposition to this motion wherein the full reversionary clause is recited. It is clear from a reading of such reversionary clause that timely payments was not unconditional but that there were innumerable instances where payments could lawfully be withheld. Such an instance is an act of government, i.e. an order of attachment. Your deponent would submit that such an order was fully contemplated by paragraph 6.

11A. Time does not permit a separate affidavit by Mr. Kass in this case at this time. However, with respect to the brand new claims of prejudice having resulted to the defendants by the temporary delay in payment of royalties your deponent, by conversations with Mr. Kass, can faithfully state that no such prejudice existed. Our client advises us that his investigation shows that defendants were paid advances which were due them pursuant to their agreement with Paramount irregardless of the withholding of publisher's royalties by Kama Rippa. In addition, the rescheduling of recording sessions, causing a slight inconvenience, cannot be said to have resulted in any substantial prejudice to the defendants. Musicians are quite used to having to be rescheduled and do not expect payments from unattended sessions. Furthermore, Peter Schekeryk when scheduling recording time for Melanie, books her time in enormous chunks and the rescheduling of portions or even all of it does not result in any prejudice to the defendants. In addition, our client advises us that his investigation shows that such rescheduling of recording time and musicians in no manner took place because of the temporary delay in royalty payments. No harm has resulted to the defendants and they have been fully paid. They cannot claim hardship at this late date and ask the Court in equity to rule in their favor. As previously pointed out this Court as a Court of equity must overrule the motion for summary judgment on equitable grounds.

12. In the course of oral argument and in defendants' reply papers, defendants' counsel has raised the contention that the only justification for the withholding of royalties is in the case of the infringement lawsuit being brought against one of the compositions written by Melanie (paragraph 10 of the Songwriters and Publishers Agreement). This contention is a bald attempt to mislead this Court. Such a provision is standard in all publishing agreements since the writer of the compositions warrants their originality. If a lawsuit is brought disputing the originality the publisher is entitled to withhold royalties. All of the foregoing assumes no particular breach of the agreement between the parties and merely contemplates the manner in which all parties share any liability of a law suit by a third party. However, the reliance of defendants on paragraph 10 with respect to the facts of this case is misplaced. Plaintiff contends that the agreement itself between the parties was breached by Melanie's refusal to release for sale three compositions. Plaintiff's contention is not refuted by the defendants herein. It is well settled that a prior breach obviates the necessity for a performance on the other side. This is the justification for withholding or late payment or other non-performance by the plaintiff since the defendants repudiated their Publishing Agreements long before the late payment of royalty payments arose.

13. Defendants' counsel goes to great lengths to state that the value of the three compositions was because Melanie's recording of a "demo" to be played for other artists was exceedingly valuable. It is submitted that defendants' counsel is not competent to testify in this regard and that his self-

serving statements are no substitute for the statements of experts in this matter. Two experts, Mr. Kass and Mr. Zynczak, have stated that the value of the three compositions was to be in their sale to the public and that a demo recorded by a major artist is totally unnecessary for the sale of a song to a third party. In addition, Mr. Frankel's statements regarding publishing and recording obligations of Melanie as being separate under her agreements with Paramount is equally fallacious.

14. Melanie is signed to Neighborhood Records, distributed by Paramount. Melanie is not signed to Paramount. Neighborhood Records is owned and controlled by Melanie's husband Peter. Melanie and Peter have total control over which compositions are to be released on any of their records. The contention that Melanie does not have such control (which contention is made by Frankel who, again, is not a sufficient substitute for the parties themselves) is simply ludicrous. In 1971 all the parties knew of Melanie's new agreements with Paramount and clearly contemplated that she would be able to release whatever she wanted. This was one of the major inducements for the execution of the Publishing Settlement Agreement and any contention by Frankel to the contrary is nonsense. Frankel is simply not competent to testify as to the facts in this matter. This issue must be answered by evidence taken from people who know, not from attorneys who pretend to know.

15. Your deponent believes that the issues herein are not ones which lend themselves to summary judgment for all of

the reasons heretofore presented. Any contention that the substantive questions regarding the obligations of the parties do not need a hearing is simply ludicrous. It was a substantive disagreement which lead to the initiation of litigation by plaintiff here and in State Court. The elemental issue which precipitated the litigation has not been resolved. Defendants have not moved in any manner against the claim for at least $75,000 based on a failure to record and release for sale by Melanie. This claim forms the heart of plaintiff's complaint. If plaintiff succeeds, as it must on this complaint, then Melanie would be deemed to be in prior breach of her agreements. How can this Court entertain any of the motion made by the defendants without first reaching the questions presented by plaintiff's original complaint? Such questions may only be reached by a full hearing before this Court on the merits.

It is respectfully requested, therefore, that defendant Melanie Schekeryk's motion for summary judgment be denied in all respects.

HARLEY I. LEWIN

Sworn to before me this
22nd day of January, 1974

Marlene H. Linder

MARLENE H. LINDER
Notary Public, State of New York
No. 31-7557600
Qualified in New York County
Certificate Filed in Kings County
Commission Expires March 30, 19 74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC., Plaintiff, -against- MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a MELANIE MUSIC, Defendants. --and-- MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC, Counterclaimants, -against- KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC., Counterdefendants.	385A SUPPLEMENTAL AFFIDAVIT ON BEHALF OF MELANIE SCHEKERYK IN RESPONSE TO KAMA RIPPA'S SUPPLEMENTARY AFFIDAVIT AND SUPPLEMENTARY MEMORANDUM OF LAW 73 CIV. 3789 (Hon. Whitman Knapp)

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

SANDOR FRANKEL, being duly sworn, deposes and says:

1. I am counsel for defendants/counterclaimants in the above-captioned matter. I respectfully submit this supplemental affidavit in response to the Supplementary Affidavit and Supplementary Memorandum of Law submitted on behalf of Kama Rippa Music, Inc. ("Kama Rippa") in opposition to the

motion by Melanie Schekeryk ("Melanie") for summary judgment on the second, third, and fifth counterclaims. This affidavit is limited to the new allegations raised for the first time in Kama Rippa's supplementary papers.

2. Kama Rippa's supplementary papers argue for the first time that Melanie was in "prior breach" of the Agreement Regarding Remaining Songwriting Obligations because, although Melanie was not required to "record" or "record and release" (as Kama Rippa now interprets the agreement) the three musical compositions until August 24, 1973, Melanie had allegedly given "positive notice of an intended breach of a contract to be performed in the future" (see Kama Rippa's supplementary memorandum of law, p. 4). On Melanie's behalf, it is respectfully submitted that even assuming arguendo (for purposes of this motion) Melanie breached the Agreement Regarding Remaining Songwriting Obligations by not releasing the three demonstration recordings, (1) the facts upon which Kama Rippa relies are insufficient as a matter of law to constitute an anticipatory breach, and (2) whether or not Melanie's alleged breach is deemed to have occurred prior or subsequent to Kama Rippa's breach, Melanie's alleged breach did not, as a matter of law, relieve Kama Rippa from its contractual obligation to make timely payment of royalties to Melanie.

3. Kama Rippa's supplementary memorandum of law admits (at p. 3) "Payment of royalties was due from Kama Rippa to

Melanie Schekeryk on August 15, 1973." Kama Rippa now claims, however, that although Melanie's obligation to "record" (however that term is defined) did not ripen until August 24, 1973, and although Kama Rippa was obligated to pay royalties not later than August 15, 1973, Melanie allegedly gave "positive notice of an intended breach of a contract to be performed in the future," and that said anticipatory breach allegedly occurred before August 15, 1973 (the date upon which Kama Rippa's continuing breach unquestionably began). The sole alleged factual support for this claim of anticipatory breach upon which Kama Rippa now relies are two letters, both from Peter Thall, Esq. (an associate in the law firm of Robert L. Casper, Esq., Melanie's general counsel), dated June 27, 1973 and July 12, 1973 (see Kama Rippa's supplementary memorandum of law, p. 4). It is significant that while Kama Rippa's supplementary papers characterize these two letters as constituting a prior breach, Kama Rippa's papers characterize but do not quote from any part of either letter, do not provide either letter for the Court to read and evaluate, and do not inform the Court of other relevant and undisputed letters between the parties. The plain reason for Kama Rippa's not providing these letters to the Court is that the letters themselves belie Kama Rippa's claim.

4. Annexed hereto as Exhibit 1 is Mr. Thall's letter of June 27, 1973 to Kama Rippa. This letter merely advises Kama Rippa that Melanie "has recorded the following three compositions" and advises Kama Rippa that the recordings are

available for Kama Rippa's inspection. (On August 16, 1973, the recordings were in fact mailed to and accepted by Kama Rippa; it is undisputed that they have remained in Kama Rippa's possession from that date up to and including today.)

5. On July 10, 1973, Kama Rippa responded through its counsel to Mr. Thall's letter, stating:

> "It appears from your letter that you and I may have different understandings of what that agreement [of August 24, 1971] requires Melanie Schekeryk to do. Would you be good enough to get back to me as soon as possible. I think this should be resolved shortly. If we do have a different understanding of the agreement, then it ought to be resolved quickly." (See Exhibit 2 annexed hereto).

6. On July 12, 1973, Mr. Thall responded by letter to the July 10 letter from Kama Rippa's counsel, expressing the opinion that "the agreement which clearly and frequently sets forth my client's obligation is limited to the recording of three compositions by Melanie." (See Exhibit 3 annexed hereto). Several days later, on July 17, 1973, Mr. Thall again wrote to Kama Rippa's counsel, stating that although in Mr. Thall's opinion (as expressed in his July 12 letter) the agreement required Melanie to record but not to release the three musical compositions, Mr. Thall did not know whether or not the three recordings would be released:

> "I have absolutely no idea whether Melanie intends to release these recordings in the future. I leave creative decisions to my client; if the release of these recordings is or will be appropriate both from Melanie's artistic viewpoint and from her interpretation

of the needs of the public, I am sure they will be released." (See Exhibit 4 annexed hereto).

7. On July 19, 1973 Kama Rippa's counsel responded to this letter by stating:

> "I'm not interested in child's play . . . . If Melanie does not intend to release the three that she was obligated to record and release for us, then we should be compelled to start a law suit. If what your letter is saying that Melanie may decide to release these or may decide in the future to release three others, then I can understand that . . . ." (See Exhibit 5 annexed hereto).

On August 15, 1973, Kama Rippa was contractually required to pay Melanie $79,436 in royalties, and failed to do so. Between the letters referred to above and August 15, 1973, there was no further exchange of correspondence between the parties. In order for one party to rely on another party's anticipatory breach of a contract, the alleged anticipatory breach must be "distinct, unequivocal, and absolute." (10 N.Y.Jur., Contracts, §396). It is respectfully submitted that as a matter of law the facts which Kama Rippa now relies upon, as described above, do not constitute an anticipatory breach by Melanie.

8. Moreover, it is respectfully submitted that Kama Rippa's allegation of Melanie's alleged breach (whether or not it is deemed "anticipatory") is irrelevant to Melanie's claim for reversion of the copyrights--Kama Rippa was obligated by the terms of the Songwriter's Agreement and the Agreement Regarding Remaining Songwriting Obligations to pay

Melanie her royalties on time, whether or not Melanie was obligated to "release" the three recordings and irrespective of whether her refusal to release them occurred before or after August 15, 1973. Various reasons which precluded Kama Rippa from withholding the $75,000, even assuming arguendo that Melanie was in breach (as alleged by Kama Rippa), are set forth in Melanie's reply memorandum of law (at Point IV, pp. 24-29 thereof) previously submitted to the Court. In addition to the reasons stated therein, deponent most respectfully wishes to emphasize one factor.

9. Among Melanie's contractual commitments under the Songwriter's Agreement (and, by incorporation, under the Agreement Regarding Remaining Songwriting Obligations) was her warranty that all musical compositions to be delivered to Kama Rippa were original and did not infringe upon any other work (see ¶ 2(B) of Songwriter's Agreement). It was further agreed that Melanie was obligated to indemnify Kama Rippa if any of her compositions did infringe another work (see ¶ 2(C) of Songwriter's Agreement). Significantly, the Songwriter's Agreement (at ¶ 10) specifically granted Kama Rippa the right to withhold payment of Melanie's royalties in the event of an infringement action. In both the Songwriter's Agreement and the Agreement Regarding Remaining Songwriting Obligations, this is the only circumstance under which a breach of any covenant by Melanie would permit Kama Rippa to withhold royalty payments; it is the sole exception to Kama Rippa's obligation to make timely payment of royalties to Melanie.

> "Where there is a specific exception or reservation in the contract, it is presumed that no other exception or reservation was intended." Royalty Indemnity Co. v. John F. Cawrse Lumber Co., 245 F.Supp. 707, 710 (D.Ore. 1965).

It is also significant that the additional list of permissible exceptions to Kama Rippa's obligation to make timely royalty payments, which appears in the last sentence of the Rider to paragraph 6 of the Songwriter's Agreement, does not include breach by Melanie as a permissible excuse. Thus, even assuming arguendo that Melanie breached the agreement by recording without releasing the three compositions, and even assuming arguendo that Melanie's alleged breach preceded Kama Rippa's breach, Kama Rippa was obligated by the express terms of the contract to make timely payment of royalties to Melanie. If Kama Rippa believed that it was entitled to $75,000 in damages for Melanie's refusal to release the recordings, Kama Rippa was required to bring an action in court rather than unilaterally withholding Melanie's royalties. This is further reinforced by the fact that Kama Rippa's obligation to make timely royalty payments or suffer reversion of the copyrights is reflected not in mere boilerplate language in the contract, but by a specific rider specifically agreed to and written in by the parties. "Where part of the contract is in writing and part is in printing, the writing will be given effect if there is repugnancy between the two portions of the instrument." 4 Williston, Contracts, 3d ed., §622.

10. It is also respectfully submitted that the memorandum opinion of Judge Markowitz vacating the order of attachment refutes Kama Rippa's claim that it was justified in withholding $75,000 because of Melanie's alleged prior breach. Judge Markowitz' opinion stated:

> "Plaintiff admittedly owes defendants approximately $80,000 . . . ." (See Exhibit 9 to deponent's moving affidavit).

Kama Rippa's admission, referred to in Judge Markowitz' opinion, was repeated several times by Kama Rippa's counsel to Judge Markowitz during the proceedings on Melanie's motion to vacate the order of attachment. In an affidavit dated October 9, 1973, Kama Rippa's counsel stated:

> "Frankel's affidavit states that plaintiff owes defendants royalties for the six month period ending June 30, 1973. Plaintiff does not deny such obligation." (See excerpt from affidavit of Harley I. Lewin, Esq., of counsel for Kama Rippa, annexed hereto as Exhibit 6; emphasis added).

In a subsequent affidavit dated October 11, 1973, Kama Rippa's counsel repeated:

> "We have in fact agreed that such royalties [i.e., the full $79,436] are due and owing and clearly stated that the only reason they were being withheld is because an Order of Attachment had been levied against them." (See excerpt from affidavit of Harley I. Lewin, Esq., of counsel for Kama Rippa, annexed hereto as Exhibit 7; emphasis added).

Thus, throughout the State Court proceedings, Kama Rippa unequivocally admitted--and Judge Markowitz accordingly held--that Kama Rippa owed Melanie the $75,000 which Kama Rippa was withholding.

11. The above admissions of Kama Rippa were not only made in the words quoted above, but in Kama Rippa's subsequent actions. When the improper order of attachment was finally vacated, Kama Rippa delivered to Melanie her check for $79,436. If Kama Rippa was justified in withholding $75,000 because of Melanie's alleged prior breach, the vacating of the order of attachment would have been irrelevant, as Kama Rippa would still have been entitled to continue to withhold $75,000. Moreover, the very obtaining by Kama Rippa of the order of attachment was itself a concession that Melanie's alleged prior breach did not justify Kama Rippa, under its agreements with Melanie, in withholding royalty payments; for if Kama Rippa was justified in withholding the $75,000 because of Melanie's alleged "prior breach", no order of attachment would have been necessary. Obviously, Kama Rippa's withholding of the $75,000 was improper and was recognized by Kama Rippa to be improper; Kama Rippa simply attempted improperly to construct an artificial justification for withholding the $75,000 by improperly obtaining the order of attachment which was subsequently vacated.

12. With respect to the remaining assertions in Kama Rippa's supplementary papers, it is respectfully submitted that Kama Rippa's contentions have already been rebutted in affidavits and memoranda of law previously submitted on Melanie's behalf.

WHEREFORE, and for the reasons contained in the

affidavits and memoranda of law previously submitted on Melanie's behalf, it is respectfully submitted that the instant motion of Melanie Schekeryk for summary judgment on the second, third, and fifth counterclaims against Kama Rippa Music, Inc. should be granted in its entirety.

Sworn to before me this
25th day of January, 1974. _____

MONA RYAN
NOTARY PUBLIC, State of New York
No. 24-0723980
Qualified in Kings County
Commission Expires March 30, 1974

395A

June 27, 1973

Kama Rippa Music, Inc.
810 Seventh Avenue
New York, New York

Attention: Mr. Arthur Kass

Re: Melanie Safka Schekeryk

Gentlemen:

Pursuant to the delivery agreement between you, Amelanie Music, Melanie and Peter Schekeryk, dated August 24, 1971, this is to advise you that Melanie has recorded the following three compositions which are included among the twenty musical compositions delivered to Kama Rippa Music, Inc. pursuant to said agreement:

1. "I ALMOST FORGOT"

2. "MOONBEAM"

3. "LET HIM SEE YOUR SMILE"

I have in my possession a 7-1/2" tape recording, half track, of Melanie's performances of such compositions. If you wish to confirm that such compositions have been recorded, please telephone my office and make an appointment to come to my office to listen to the tape.

Very truly yours,

Peter M. Thall

PMT:gr
cc: Joseph E. Zynczak, Esq.
Mr. Peter Schekeryk - N.J. & N.Y.
CERTIFIED MAIL,
RETURN RECEIPT REQUESTED.

EMIL. KOBRIN KLEIN & GARBUS

ATTORNEYS AT LAW

396A

ARTHUR D. EMIL
LAWRENCE KOBRIN
ARTHUR A. KLEIN
MARTIN GARBUS
MICHAEL I. FRANKFURT

WILLIAM F. PURCELL
OF COUNSEL

HELENE L. KAPLAN
FRED J. HANSEY, JR.
HARLEY FLWIN
MARC FELCHT
ROGER H. KIMMEL

540 MADISON AVENUE NEW YORK, N.Y. 10022
(212) PL 8-604
CABLE ADDR: A.E.MILLAW
TELEX 620231

July 10, 1973

Peter M. Thall, Esq.
c/o Robert L. Casper, P.C.
1780 Broadway
New York, New York 10019

Re: Melanie Safka Schekeryk

Dear Mr. Thall:

I have seen your letter dated June 27, 1973 in relationship to Melanie Safka Schekeryk. Your letter advises that three songs have been recorded and these are to be included among the twenty musical compositions delivered to Kama Rippa Music, Inc. pursuant to said agreement. As you are aware, under the agreement between the parties, those recordings are to be released. I direct your attention to the second page of the August 24, 1970 letter which sets a penalty clause for the failure of Melanie Schekeryk to comply with the terms of the agreement.

It appears from your letter that you and I may have different understandings of what that agreement requires Melanie Schekeryk to do.

Would you be good enough to get back to me as soon as possible. I think this should be resolved shortly. If we do have a different understanding of the agreement, then it ought to be resolved quickly.

Sincerely,

Martin Garbus

MG:aem
Certified Mail, R.R.R.

397A

July 12, 1973

Martin Garbus, Esq.
Emil, Kobrin, Klein & Garbus
540 Madison Avenue
New York, New York 10022

Re: Melanie Safka Schekeryk

Dear Mr. Garbus:

I have received your letter of July 10 which is dully noted.

I take objection to your statement that I am aware that the recordings are to be released. My letter of June 27 and my response to your interpretation of the agreement during our telephone conversation should have made it clear that my interpretation and that of my client are based on the provisions of the agreement which clearly and frequently set forth my client's obligation is limited to the recording of three compositions by Melanie.

Sincerely yours,

Peter M. Thall

PMT/aw

bcc: Isador Schachter
Bob Esposito
Peter Schekeryk

July 17, 1973

Martin Garbus, Esq.
Emil, Kobrin, Klein & Garbus
540 Madison Avenue
New York, New York 10022

Re: Melanie Safka Schekeryk

Dear Martin:

I was disturbed to receive your letter of July 13, 1973 which misstates the content of our telephone conversation.

For the record, the only communication that I have had with you set forth this office's and my client's interpretation of the obligations under the agreement. We interpret those obligations to be limited to the recording of three compositions, not the release thereof.

Outside of the fact that "my intentions" even if they were expressed to you, which they were not, would have absolutely no effect on the planning of Melanie's release schedule or that of other artists, I have absolutely no idea whether Melanie intends to release these recordings in the future. I leave creative decisions to my client; if the release of these recordings is or will be appropriate both from Melanie's artistic viewpoint and from her interpretation of the needs of the public, I am sure they will be released.

You and I have not dealt with each other before and I don't know why it is necessary for me to constantly have to reply to your self-serving letters to set the record straight. If you are trying to build a case for litigation, I suggest you use the customary forums to resolve this dispute and cease trying the case in the mails.

Sincerely yours,

Peter M. Thall

PMT:gr

4

EMIL, KOBRIN KLEIN & GARBUS
ATTORNEYS AT LAW

399A

540 MADISON AVENUE NEW YORK, N.Y. 10022
(212) M[illegible] 8040
CABLE ADDR. ADEMIL NY
TELEX V[illegible] 220231

ARTHUR EMIL
LAWRENCE A. KOBRIN
ARTHUR J. KLEIN
MARTIN GARBUS
MICHAEL P. FRANKFURT

WILLIAM F. PURCELL
OF COUNSEL

HELENE L. KAPLAN
FRED J. HALSEY, JR.
HARLEY LEWIN
MARC HECHT
ROGER H. KIMMEL

July 19, 1973

Peter M. Thall, Esq.
c/o Robert L. Casper, P.C.
1780 Broadway
New York, New York 10019

Re: Melanie Safka Schekeryk

Dear Peter:

I'm not interested in child's play. Peter, I understood that you interpret your contractual obligations to be limited to the recording of the three compositions, not the release. If Melanie does not intend to release the three that she was obligated to record and release for us, then we should be compelled to start a law suit. If what your letter is saying that Melanie may decide to release these or may decide in the future to release three others, then I can understand that. But I cannot accept the proposition that all she is required to do is to record the three and then that releases her from her obligation to us.

Best,

Martin Garbus

MG:aem

14. In the affidavit securing the Order of Attachment, it was stated clearly that plaintiff intends to and will perform all the terms of the Songwriters Agreement, as amended, with defendants. Plaintiff has not tried to create any defense to the alleged "demand" or possible reversion of copyrights, as Frankel would state, as plaintiff has a further period of time in which to deliver monies due defendants pursuant to its publishing agreements therewith. Mr. Lewis M. Bachman is not a defendant, is not defendants' agent and we believe, plaintiff could be faulted for dealing with him. A demand made by Mr. Bachman is not demand by defendants and bears no weight with plaintiff. Should defendants seek to cause a reversion in copyrights based on the September 24, 1973, cut off date plaintiff will most vigorously defend as no demand has been made which would include such date as a cut off for reversion.

15. Paragraph 26 of Frankel's affidavit states that plaintiff owes defendants royalties for the six month period ending June 30, 1973. Plaintiff does not deny such obligation. As has been previously stated plaintiff attempted to deliver the amounts in excess of $75,000 both to defendants' counsel Robert L. Casper, Esq. and Louis M. Bachman of the American Guild of Authors and Composers. Both parties refused to take a hand delivery of said checks and in addition, both parties have refused to receive certified mail containing such checks.

VII. THE SCHEKERYKS RESIDE IN AND ARE DOMICILED IN NEW JERSEY, NOT NEW YORK.

16. Section 5 of Frankel's affidavit, paragraphs 28 through 34, argues that the jurisdiction for the attachment is

[Excerpt from affidavit of Harley I. Lewin, Esq., of counsel to Kama Rippa Music, Inc., dated October 9, 1973]

15. The statement contained in Frankel's letter of September 13, 1973, and in his affidavits regarding said letter, are completely self-serving. If we are to observe any demand it would be a demand of Frankel, not the AGAC. It is interesting to note that despite the request, most recently made, for the support of the authority of the AGAC to demand actions on plaintiff's part for defendants, that is, a copy of the agreement between defendants and the AGAC, has never been responded to. Frankel's affidavit states that this was the first time such a demand had been made. This is true, precisely because we had questioned the AGAC's authority to make such a demand. No one, to date hereof, has come forward with a copy of any document evidencing the authority of the AGAC to act on behalf of Melanie Schekeryk in her dealings with plaintiff herein. Until such a time as the authority for such demand is shown and proven to plaintiff, plaintiff is fully justified refusing to recognize such alleged authority. Perhaps a reason that a copy of such contract is not forthcoming is because AGAC does not have such authority and the contract would reveal same.

16. Your deponent has not yet been able to fathom the reason why partial tender of royalties due was not accepted by Melanie's alleged agents. No one has claimed that acceptance of such payment would be a waiver of any of Melanie's claims for the balance of royalties. We have in fact, agreed that such royalties are due and owing and clearly stated that the only reason they were being withheld is because an Order of Attachment had been levied against them The Order of Attachment had been levied against them at plaintiff's insistence because this is the only way that plaintiffs could (a) secure jurisdiction and (b) preserve at least some assets for judgment in plaintiff's favor. Frankel's statement regarding partial payment is simply self-serving and do not bear on the issue at hand. An Order of

[Excerpt from affidavit of Harley I. Lewin, Esq., of counsel to Kama Rippa Music, Inc., dated October 11, 1973]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

--and--

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

- x

_ 402A

NOTICE OF ENTRY

Civil Action No.
73 CIV. 3789

SIRS:

PLEASE TAKE NOTICE that the within are true copies of (1) an "Order and Judgment" duly entered in the Office of the Clerk of the within named Court on July 22, 1974, and (2) the "Opinion" duly docketed in the Office of the Clerk of the within named Court on June 19, 1974.

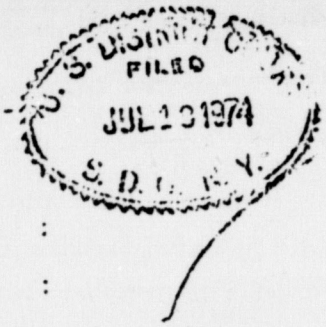
Dated: New York, New York
July 24, 1974

Yours, etc.

SANDOR FRANKEL
Attorney for Defendants/
Counterclaimants
225 Broadway
New York, New York 10007
(212) 227-6000

TO: EMIL, KOBRIN, KLEIN & GARBUS, Esqs.
Attorneys for Plaintiff/Counterdefendants
540 Madison Avenue
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,.

Defendants.

--and--

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

- 404A

ORDER AND JUDGMENT

Civil Action No. 73 CIV. 3789

Plaintiff-counterdefendant Kama Rippa Music, Inc. and counterdefendants Kama Sutra Music, Inc. and Buddah Records, Inc. having moved pursuant to Rule 12 of the Federal Rules of Civil Procedure for an order dismissing all claims asserted against them by defendants-counterclaimants Melanie Schekeryk and Peter Schekeryk (individually and d/b/a Amelanie Music and Two People Music); and defendant-counterclaimant Melanie Schekeryk having cross-moved pursuant to Rule 56(a) of the Federal Rules of Civil Procedure for summary judgment against plaintiff-counterdefendant Kama Rippa Music, Inc. on the second, third and fifth counterclaims asserted by Melanie Schekeryk against

Kama Rippa Music, Inc.; and said motions having regularly come on to be heard by the Court, upon all pleadings and proceedings heretofore had herein, and due deliberation having been had, and it being expressly determined that there is no just reason for delay and expressly directed that final judgment upon separate issues be entered as follows, and the Court having rendered a memorandum opinion dated June 17, 1974, it is hereby

ORDERED, ADJUDGED, and DECREED:

1. That the cross-motion of Melanie Schekeryk for summary judgment on the second counterclaim asserted by Melanie Schekeryk against Kama Rippa Music, Inc. is granted;

2. That the cross-motion of Melanie Schekeryk for summary judgment on the third counterclaim asserted by Melanie Schekeryk against Kama Rippa Music, Inc. is granted;

3. That it is hereby declared that all rights in and to all musical compositions delivered to Kama Rippa Music, Inc. by or on behalf of Melanie Schekeryk have reverted in their entirety to Melanie Schekeryk by operation of law, including but not limited to all copyrights therein and all renewal copyrights therein (together with all administration rights thereto), throughout the world in their entirety (the musical compositions referred to herein include but are not limited to all musical compositions the titles of which are annexed hereto as Exhibit 1);

4. That Kama Rippa Music, Inc. is hereby ordered to deliver forthwith to Melanie Schekeryk all files, copyright certificates, copies

of sub-publishing agreements, license agreements, books, records, indicia of ownership or control, and all other documents and objects of any type or nature or description whatever, affecting or relating to the musical compositions specified in "3" (above);

5. That Kama Rippa Music, Inc., its deputies, agents, employees, representatives, attorneys, affiliates, and other persons or entities in concert or participation are forever, perpetually, and permanently restrained and enjoined from holding themselves out in any manner as having any interest whatsoever in the musical compositions specified in "3" (above);

6. That the provisions of paragraphs "1"-"5", inclusive (above), shall be deemed to take effect and be operative nunc pro tunc as of September 25, 1973;

7. That Kama Rippa Music, Inc. shall, within twenty days of service of a copy of this order with notice of entry upon Emil, Kobrin, Klein & Garbus, Esqs., attorneys of record for Kama Rippa Music, Inc., deliver to Sandor Frankel, Esq., at 225 Broadway, New York City, New York, attorney of record for Melanie Schekeryk, a full and complete accounting of all moneys received by or delivered to Kama Rippa Music, Inc. or to any deputy, employee, agent, attorney, affiliate, or other representative of Kama Rippa Music, Inc., for or with respect to or in connection with the musical compositions specified in "3" (above) from or after September 25, 1973, said accounting to be verified under penalty of perjury by a duly authorized officer of Kama Rippa Music, Inc., and said accounting to be certified by a certified public accountant;

8. That at the time and place referred to in "7" (above), Kama Rippa Music, Inc. shall deliver to Sandor Frankel, Esq., as attorney of record for Melanie Schekeryk, a sum of money equal to all sums of money received by Kama Rippa Music, Inc., or by any deputy, employee, agent, attorney, affiliate, or other representative of Kama Rippa Music, Inc., for or with respect to or in connection with any of the musical compositions specified in "3" (above) from or after September 25, 1973 which Kama Rippa Music, Inc. has not yet paid to Melanie Schekeryk or to her authorized representative, with interest;

9. That upon transmittal to the Register of Copyrights of the United States of a certified copy of this order, said Register of Copyrights shall execute such documents and other records with respect to the musical compositions specified in "3" (above) as shall be necessary to effect the provisions of decretal clauses "1" through "6" (inclusive) of this order;

10. That the cross-motion of Melanie Schekeryk for summary judgment on the fifth counterclaim asserted by Melanie Schekeryk against Kama Rippa Music, Inc. is denied;

11. That the motion of Kama Rippa Music, Inc. to dismiss the second, third, and fifth counterclaims asserted by Melanie Schekeryk against Kama Rippa Music, Inc. is denied.

12. That the motion of Kama Rippa Music, Inc. to dismiss the sixth counterclaim asserted by Melanie Schekeryk against Kama Rippa Music, Inc. is granted on the grounds that the relief sought by Melanie Schekeryk in said sixth counterclaim has been rendered moot by decretal clauses "1" through "9" (inclusive) of this Order and Judgment;

13. That the motions of Kama Rippa Music, Inc., Kama Sutra Music, Inc., and Buddah Records, Inc. to dismiss claims asserted against them by Melanie Schekeryk and Peter Schekeryk (individually and d/b/a Amelanie Music and Two People Music) on the grounds of alleged improper addition of parties and alleged failure of service of process are hereby denied, and said alleged defects, if any, are hereby deemed cured nunc pro tunc;

14. That the motion of Kama Rippa Music, Inc. to dismiss the first and fourth counterclaims asserted against it by Melanie Schekeryk and Peter Schekeryk (individually and d/b/a Amelanie Music and Two People Music) is hereby denied;

15. That the motion of Kama Sutra Music, Inc. to dismiss the first claim asserted against it by Melanie Schekeryk and Peter Schekeryk (individually and d/b/a Amelanie Music and Two People Music) is hereby denied;

16. That the motion of Buddah Records, Inc. to dismiss the fifth claim asserted against it by Melanie Schekeryk and Peter Schekeryk is hereby denied.

17. That the motion of Buddah Records, Inc. to dismiss the first, second, third, fourth, sixth, seventh, and eighth claims asserted against it by Melanie Schekeryk is hereby granted;

18. That execution of or any proceedings to enforce execution of any portion of this Order and Judgment are hereby stayed to the following extent only:

(a) Execution of and proceedings to enforce execution of this Order

and Judgment are stayed for a period of ten days from the date of the signing by the Court of this Order and Judgment;

(b) If a motion for reargument or reconsideration of the Court's decision of June 17, 1974 is made by any party within ten days from the date of the signing by the Court of this Order and Judgment, then the stay referred to in "a" (above) shall continue to and including the date of a decision by the Court on said motion; if said motion is denied by the Court, then said stay shall forthwith cease and be of no further force or effect, and no further stay shall be in effect except as hereinafter set forth;

(c) Notwithstanding the provisions of "a" and "b" (above), Kama Rippa Music, Inc., its deputies, agents, employees, representatives, attorneys, affiliates, and other persons or entities in concert or participation, are restrained and enjoined during the time period of the stay specified in "a" and "b" (above) from entering into any contract or agreement of any nature or type whatsoever for or in connection with or with respect to musical compositions specified in decretal clause "3" (above), except with the written consent of Melanie Schekeryk;

(d) For use between the signing of this order and the time within which Kama Rippa Music, Inc. is required to file its notice of appeal to the United States Court of Appeals for the Second Circuit (if such an appeal is to be taken by Kama Rippa Music, Inc.), and for use during the pendency of any such appeal by Kama Rippa Music, Inc. to the United States Court of Appeals for the Second Circuit from the provisions of decretal clauses "1" through "9"

of this Order and Judgment, the parties shall forthwith establish at the Chemical Bank, 265 Broadway, New York City, New York, a joint bank account in the names of Melanie Schekeryk (or her attorney or other authorized representative) and Kama Rippa Music, Inc. (or its attorney or other authorized representative) (this account is hereinafter referred to in this Order and Judgment as the "Escrow Account"). This Escrow Account shall be in the form of a joint savings account. The sole signatories to this Escrow Account shall be Melanie Schekeryk (or her attorney or authorized representative) and Kama Rippa Music, Inc. (or its attorney or authorized representative). No withdrawal from this account may be made except by the joint signatures of Melanie Schekeryk (or her attorney or authorized representative) and Kama Rippa Music, Inc. (or its attorney or authorized representative). In the absence of written agreement between Melanie Schekeryk (or her attorney or authorized representative) and Kama Rippa Music, Inc. (or its attorney or authorized representative), no money shall be withdrawn from the Escrow Account except by further order of this Court. Into this Escrow Account Kama Rippa Music, Inc. shall deposit, within the time provided by decretal clause "8" of this Order and Judgment, all sums of money specified in decretal clause "8" of this Order and Judgment which Kama Rippa Music, Inc. would otherwise have been entitled to receive pursuant to the written agreement among Kama Rippa Music, Inc., Melanie Schekeryk, and Amelanie Music, dated May 31, 1968, with interest. Into this Escrow Account Melanie Schekeryk shall deposit, from time to time as moneys are received during the administration by Melanie Schekeryk of the

copyrights referred to in "3" (above) during the pendency appeal, if any, by Kama Rippa Music, Inc. to the United States Court of Appeals for the Second Circuit, a sum of money equal to the sum of money which Kama Rippa Music, Inc. would otherwise have been entitled to receive pursuant to the written agreement among Kama Rippa Music, Inc., Melanie Schekeryk, and Amelanie Music, dated May 31, 1968;

(e) There shall be no stay of any provision of this Order and Judgment except as expressly set forth above.

Dated: New York, New York
July 16, 1974

United States District Judge

EXHIBIT 1

Again
Any Guy
Babe Rainbow
Baby Guitar
Birthday of the Sun
Candles in the Rain
Citiest People
Deep Down Low
For My Father
Good Book
The Good Guys
I Don't Eat Animals
Isn't It a Pity
Johnny Boy
Lay Down
Leftover Wine
Lovin' Baby Girl
My Beautiful People
Nickel Song
On the Way Down
Peace Will Come
The Prize
The Saddest Thing
Take Me Home
Tuning My Guitar
Uptown Down
What Have They Done to My Song, Ma ("Look What They Done to My Song, Ma")
You Can Go Fishing
Don't You Wait by the Water
Ask Me Again
I Really Loved Harold
Momma Momma
Walk the World
Why Didn't Mother Tell Me
Please Love Me
Close to It All
Do You Wait by the Water
Tears to the Ground
Jigsaw Puzzle
My Bonnie Lies Over
Pebbles in the Sand
People in the Front Row
Save the Night
Getting Out
Love in My Mind
Nobody Wants to Take You Home
If I Go
Love is My Shadow
I'm Not the Kind
The Morning
As I Went Walking
Sing All My Sorrows
Flatlands of Holland
This Time
Singing for Jason
Hey, You People
I'm the Girl Who Rides
Pudding Road
I Almost Forgot
Moonbeam
Brother, Oh Brother
Restless Wind
Graveyard
A Curse or a Joy
Let Him See You Smile

413A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

- against -

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a MELANIE MUSIC,

Defendants.

- and -

MELANIE and PETER SCHEKERYK, individually and d/b/a MELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

- against -

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

MICROFILM

OPINION

73 Civ. 3789

#40836

FILED
U.S. DISTRICT COURT
JUN 19 11 51 AM '74
S.D. OF N.Y.

APPEARANCES:

EMIL, KODRIN, KLEIN & GARBUS
Attorneys for Plaintiff and Counterdefendants
540 Madison Avenue
New York, New York 10022
By: Martin Garbus
Harley I. Lewin,
Of Counsel

SANDOR FRANKEL
Attorney for Defendants and Counterclaimants
225 Broadway
New York, New York 10007

The central character in this complicated lawsuit is one Melanie Safka Schekeryk, popularly known in the world of music as Melanie. Under that name she has created a considerable reputation as a singer, songwriter, composer and musician, and by that name she will be called in this opinion. She and her husband, Peter Schekeryk, are the sole partners of two publishing partnerships known as "Amelanie Music" and "Two People Music".

Melanie, her husband and their partnerships (Defendants and Counterclaimants) are in general dispute with an interrelated group of corporations known as Kama Rippa Music, Inc., Kama Sutra Music, Inc. and Buddah Records, Inc. (Plaintiff and Counterdefendants). Kama Rippa and Kama Sutra are music publishers who shall hereinafter collectively be referred to in the singular as "Kama",[1] and Buddah manufactures and sells phonograph records and

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[1] The two "Kama" corporations and Buddah use a common letterhead on which the three of them are listed under the heading "The Kama Sutra Group". They do not themselves seem to be able to distinguish between Kama Rippa and Kama Sutra. For example, the 1968 Songwriter's Agreement purports to be between Melanie as Writer and Kama Rippa as Publisher, while a rider to paragraph 2(c) of that Agreement purports to redefine the rights between Melanie and Kama Sutra as Publisher.

other types of recordings. 416A

What is basically involved in this dispute is one disagreement - complex and multifaceted though it may be - which arose on or about May 14, 1971 when Melanie, who had been recording musical compositions for Buddah, transferred her allegiance to Paramount Records, Inc.

First, let us consider the situation prior to that date. Back in 1968 Melanie and one of her publishing partnerships made an agreement ("Songwriter's Agreement") with Kama, whereby Kama would publish music composed by Melanie, the resulting royalties to be divided according to a complicated formula. Melanie's share of such royalties were to be paid twice a year in February and August to cover the six-month periods ending the preceding December and June. Riders to this agreement provided, among other things, that the timely payment of such royalties were to be "of the essence", but that Kama could - unless Melanie posted a bond - withhold royalties in the event that the copyrights to any of Melanie's songs were challenged by a third party. The agreement contained no other provision for the withholding of royalties except for "acts of God" and similar occurrences. At the same time some of the parties involved entered into another agreement ("Co-Publishing Agreement") the exact terms of which do not seem necessary to an understanding of the situation.

In October of the same year Melanie entered into an agreement ("Artist Recording Agreement") with Buddah Records, which in effect required Melanie to record and Buddah to release a certain number of records. The agreement provided that Buddah should have practically all imaginable rights with respect to such recordings. The agreement gave Buddah two consecutive options to renew for periods of one year each, and provided that Buddah's obligation to release Melanie's recordings was the "essence" of the agreement.

Sometime prior to May 14, 1971, these arrangements began to fall apart and - in circumstances which are subject to dispute - Melanie transferred her allegiance to an entity known as Paramount Records. The dispute engendered by this transfer of allegiance resulted in an agreement ("Recording Settlement Agreement") between, among other parties, Melanie and Buddah. So far as here appears relevant, this agreement gave Paramount all rights and obligations relative to Melanie's future services, but retained for Buddah all its rights with respect to prior recordings, subject to its obligation to pay royalties.

In August of 1971, Melanie and Kama entered into a "Letter Agreement" which purported to settle a dispute which had arisen about Melanie's remaining obligations to deliver musical compositions pursuant to the 1968 Songwriter's Agreement. The Letter

Agreement provided, among other things, that Melanie was to record at least three songs within a two-year period. The agreement said nothing about "releasing" any of these songs. As will be seen, considerable dispute has arisen as to the significance of this omission.

This "settlement" seemed to satisfy the parties for a period of about a year and a half. In March of 1973, letters were addressed on Melanie's behalf to Kama complaining of the non-payment of the six months' royalties that had been due in February. This dispute was settled by payment to Melanie. In her letter acknowledging such payment, Melanie called attention to the rider to the 1968 Songwriter's Agreement which made prompt payment to be "of the essence", took note of Melanie's "right of audit" in the agreement itself, and specifically asserted that neither of these rights were being waived.

In June of 1973, the dispute which ultimately resulted in this lawsuit began to erupt. Briefly stated, Kama - in a series of letters - claimed that Melanie had breached the Letter Agreement of August 26, 1971 by failing to "release" three songs which she had recorded. Melanie responded with the flat assertion that she was under no obligation to release. Kama countered by withholding royalties which fell due on August 15, 1973 under the 1968 Songwriter's Agreement. Melanie reacted to this by a series of letters[2]

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[2] Some of these letters were through an agent (AGAC). As I have found the agent's authority to have been established (<u>infra</u> p. 12), that circumstance is here irrelevant.

which, with accelerating degrees of specificity, demanded payment, asserted her rights under the "of the essence" rider, and ultimately declared the copyrights forfeited.

On August 31st, plaintiff commenced this lawsuit. The complaint, in essence, demanded enforcement of Melanie's alleged obligation under the 1971 Letter Agreement to "release" the songs she had recorded.

Melanie responded with a general denial, and a series of counterclaims demanding a wide variety of relief. It is here pertinent to observe that these counterclaims sought, among other things, accountings for all royalties due Melanie, and for a declaratory judgment establishing that all copyrights had reverted to her.

On September 18, 1973, Kama started an identical action in the Supreme Court of New York County, and obtained an orer of attachment - which it caused the Sheriff to serve on itself - purporting to attach any and all of its indebtednesses to Melanie. This attachment was vacated by order of the Supreme Court dated November 2, 1973. The state action is of no further relevance to this opinion.

Various motions are now before the court. At this stage of the opinion, I shall deal only with Melanie's motion for summary judgment on her second and third counterclaims against Kama, which ask for a declaration that all rights in compositions previously

assigned by her to Kama have reverted to her, and for injunctive relief in effect requiring Kama to recognize such reversion. For reasons which follow, such motion will be granted.

The basic facts upon which Melanie relies in support of her motion are as follows:

On August 23, 1973, no royalties having been received with respect to the six-month period ending June 30, 1973, the American Guild of Authors and Composers (AGAC), acting on Melanie's behalf, made demand upon Kama. Its letter asserted:

> "Your failure to remit timely royalty payments to AGAC on behalf of our member, Melanie Safka, constitutes a material breach of your agreement with her.
>
> Your retention of copyrights is placed in jeopardy failing immediate payment with interest at 6% from due date of payment (August 15th)."

This letter was received by Kama on August 24th.

On September 13th, Melanie's lawyer addressed a letter to Kama's legal counsel rejecting a proposed compromise and ratifying the foregoing demand.

On September 26th, Melanie's attorney addressed a letter to Kama declaring the forfeiture now asserted. This letter provided, among other things:

> ". . . please be advised that all rights in and to all compositions delivered to you by Melanie, including but not limited to all copyrights therein and all renewal copyrights therein (together with the worldwide administration rights thereto), have reverted to Melanie throughout the world in their entirety."

No payment was received by Melanie until November 27, 1973, which was more than thirty days after demand (i.e. 95 days after August 24th).

Kama, aside from certain procedural objections[3], resists the motion on the following grounds:

1. Melanie's breach of her obligation to "release" alleged to arise under the 1971 Letter Agreement justified Kama in withholding royalties due under the 1968 Songwriter's Agreement;

2. Melanie's demands were improper in that the authority of her agent (AGAC) to make them had not been established;

3. Melanie had waived her rights under the "of the essence" rider to the 1968 Songwriter's Agreement;

4. Kama was prohibited from paying the royalties by its own writ of attachment, and therefore has the defense of "impossibility of performance";

5. It would be inequitable to declare a forfeiture.

The first of these contentions is the most troublesome, as I cannot accept Melanie's contention that her right to refuse release of the recordings is so clear that, in effect, plaintiff's complaint should be dismissed for failure to state a cause of action. The meaning of the 1971 Letter Agreement in this regard is at best ambiguous. The resolution of the ambiguity will require consideration

[3] Without going into detail, I find the procedural objections no bar to a consideration of the merits.

of trade practices and the parties' understanding of the words used. This, in turn, will require an evidentiary hearing.

The question, then, is whether Melanie's rights to royalty payments under the 1968 Songwriter's Agreement are or are not independent of any obligations she might be said to have incurred under the 1971 Letter Agreement. I believe that they are.

As originally drafted[4], the contract so far as here relevant, provided: Melanie warranted that any musical compositions she delivered could be the subjects of proper copyrights, and she agreed to deliver a certain number of such songs on a prescribed schedule. Kama undertook to pay royalties and make accountings therefor on a prescribed schedule, subject however to the right to withhold if any third person should advance a claim of invalidity of copyright. There was nothing in this original contract which gave Melanie's right to royalties any preference over any other right or obligation arising out of the contract. On the contrary, Melanie's obligation to deliver was designated as "of the essence".

Melanie was apparently dissatisfied with this proposed arrangement. The contract as finally executed was subject to three riders which drastically altered its impact. These riders made the

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4 It would seem that the original draft followed a standard Kama form. See, for example, paragraph 17 which takes account the possibility that the agreement might be signed by "more than one individual as Writer".

prompt payment of and accounting for royalties "of the essence", provided that such payment and accountings could be excused only by "acts of God" and similar occurrences[5], and provided that default on this obligation would result in a reversion to Melanie of all rights to the compositions she had theretofore conveyed. These riders further provided that Melanie could - by posting appropriate security - even require the prompt payment of royalties in the face of third-party attacks upon the validity of copyrights.

I rule that these riders establish that Melanie's right to prompt payment of and accounting for accrued royalties was intended to be given a status independent of any other right or obligation any party might have. Any lurking ambiguity inherent in the parties' failure to remove the expression "of the essence" from the description of Melanie's obligation to deliver compositions would be resolved by the doctrine that conflicts between riders and the original form shall

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[5] Plaintiff calls attention to the word "or dissimilar" in one of the riders. I find that, in the context, no rational meaning can be given to that word, and that it should be ignored. (See New York Central Railroad Co. v. New York, New Haven & Hartford Railroad Co. (Sup. Ct., New York County 1960) 208 N.Y.S. 2d 605, 616, mod. on other grounds (1st Dept. 1961), aff'd. (1962) 11 N.Y. 2d 1077.)

be resolved in favor of the former. (See Robertson v. Charles Frohman, Inc. (1st Dept. 1921) 191 N.Y.S. 55; Collins v. Knuth (2d Dept. 1900) 64 N.Y.S. 549; Kratzenstein v. Western Assurance Co. (1889) 116 N.Y. 54.)

This construction of the 1968 Songwriter's Agreement (as amended by the riders) is confirmed by the 1971 Letter Agreement by which the parties, in effect, eliminated the "of the essence" from the provision defining Melanie's obligation to deliver compositions. The Letter Agreement purported to settle a dispute as to the extent of Melanie's obligation under that provision. So far as here relevant, the dispute was settled by requiring Melanie to record three compositions, and by providing liquidated damages as the "sole" remedy for any breach of such requirement.

Were there any lingering doubt as to the independent status of Melanie's right to royalties under the 1968 Songwriter's Agreement, such doubt would be resolved by the practical interpretation evidenced by Kama's conduct. About a week before Melanie's right to reversion was to mature, Kama obtained the order of attachment upon which it planned to base its defense of "impossibility" (see infra). The day the Sheriff formally "released" the attachment, Kama paid the royalties.

I rule, therefore, that Melanie's right to receive prompt payment of and accounting for the royalties under the 1968 agreement

was independent of any obligations [illegible] have had to Kama.

There is no substance in the claim that AGAC was unauthorized to make a demand on Melanie's behalf. In the first place, it is of no consequence to Kama whether AGAC was authorized or not. Assuming AGAC to have acted as a volunteer, it would have been Melanie's privilege to adopt its act as her own, which adoption would have been accomplished by her attorney's letter of September 19th. In the second place, I rule - for reasons it seems unnecessary to elaborate - that AGAC's authority to act for Melanie has been conclusively established.

The claim that Melanie had waived her rights under the 1968 Songwriter's Agreement is equally specious. In the first place, the agreement clearly states that no waiver of a right would constitute a future waiver of the same right. In the second place, each communication from or on behalf of Melanie to Kama clearly stated that no waiver of rights was intended. Finally, assuming there had been a waiver, Kama has suggested no prejudice in having relied thereon.

The claim of impossibility is perhaps the most specious of all. As above indicated, about a week before Melanie's rights were to mature, Kama purported to obtain an attachment order which it

caused the Sheriff to serve upon itself, which order purported to prohibit Kama from paying Malanie her royalties. As was ultimately determined by the New York Supreme Court, this attachment was obtained on improper papers and was therefore invalid. However, assuming the attachment to have been valid, Kama cites no New York case for the proposition that a party to a contract can provide itself with a defense of impossibility of performance by causing a Sheriff to serve a warrant upon itself. The reason that no such case is cited is that obviously no court would assert such a ridiculous proposition.

Finally, we come to the claim that it would be inequitable to impose a forfeiture. This claim has at least a surface plausibility, as the consequences of forfeiture are indeed grave to Kama. However, the claim cannot stand. In the first place, while it is clear that equity does not favor a forfeiture, it is equally clear that equity will not prohibit a party to a contract from claiming a forfeiture if the contract clearly provides for one. (See Kern River Co. v. United States (1921) 257 U.S. 147; DeMille Co. v. Casey (Sup. Ct., New York County 1921) 189 N.Y.S. 275; Industrial Development Foundation v. United States Hoffman Machinery Corp. (Sup. Ct., Cayuga County 1958) 171 N.Y.S. 2d 562; aff'd. (4th Dept. 1969) 183 N.Y.S. 2d 1011. As the court observed in Industrial Development Foundation (171 N.Y.S. 2d at 575):

"Equity will not refuse the relief of specific performance because of difficulties or hardships which were or should have been within the contemplation of the parties when the contract was made."

In the second place, Kama's conduct hardly commends itself to equitable considerations. Where a corporation, acting under legal advice, deliberately embarks upon a campaign of brinkmanship, equity is hardly likely to step in to protect it from the consequences of failure simply because it has miscalculated the odds.

For all of the foregoing reasons, summary judgment will be granted to Melanie on her second and third counterclaims against Kama.

The foregoing disposes of the basic controversy presented by the motions before me. I shall try to deal briefly with those that remain.

1. Melanie moves for summary judgment on her fifth counterclaim against Kama Rippa[6] which seeks compensatory and punitive damages based on alleged abuse of process. As to punitive damages, malice would have to be proved, and malice cannot be established by summary judgment. As to compensatory damages, since the attachment was wholly nugatory, it is difficult to see how Melanie could have

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6 In dealing with these motions, Kama Rippa and Kama Sutra will be separately designated.

been damaged (except for counsel fees which are recoverable under the attachment bond). Melanie's motion for summary judgment on this counterclaim is accordingly denied.

2. Melanie's sixth counterclaim against Kama Rippa appe to demand damages in certain contingencies which the main portion of this opinion has rendered impossible. The motion to dismiss that counterclaim is accordingly granted.

3. Kama Rippa, Kama Sutra, and Buddah move for a variet of relief on technical grounds, such as improper addition of parties and failure of service of process. Such technicalities are deemed cured nunc pro tunc, and the relief requested is denied.

4. Melanie's first and fourth counterclaims against Kam Rippa, the first against Kama Sutra, and the Fifth against Buddah demand accountings of various sorts. The motion to dismiss those counterclaims is denied.

5. There remain to be dealt with a variety of claims by Melanie against Buddah Records, asserted in the 1st, 2nd, 3rd, 4th, 6th, 7th and 8th counterclaims against Buddah. These all assert - one way or other - that Melanie has rights in recordings made by Bu prior to the 1971 Recording Settlement Agreement. However, that agreement (in paragraph 8) explicitly reserves all such rights to

Buddah. These counterclaims are accordingly dismissed.

6. Decision is reserved on the motion to strike Melanie's demand for a jury trial.

Settle order on five days notice.

SO ORDERED.

Dated: New York, New York
June 17, 1974.

WHITMAN KNAPP, U.S.D.J.

United States District Court
for the
Southern District
of
New York

KAMA RIPPA MUSIC, INC.,
Plaintiff,
- against -
MS. MELANIE SCHEKERYK, et al,
Defendants,
- and -
MELANIE and PETER SCHEKERYK, etc.,
Counterclaimants,
- against -
KAMA RIPPA MUSIC, et al.,
Counterdefendants.

OPINION

WHITMAN KNAPP, D. J.

73 Civ. 3789

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC., Plaintiff, -against- MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC, Defendants. --and-- MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC, Counterclaimants, -against- KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC. and BUDDAH RECORDS, INC., Counterdefendants.	431A NOTICE OF MOTION Civil Action No. 73 Civ. 3789 (Judge Whitman Knapp)

PLEASE TAKE NOTICE, that upon the annexed affidavit, with exhibits, of Fred J. Halsey, Jr., Esq., sworn to July 26, 1974, the cross-motion for summary judgment of defendant-counterclaimant Ms. Melanie Schekeryk, the affidavits and papers submitted in support and in opposition thereof and upon the Opinion and the Order and Judgment entered thereon on the 22nd day of July, 1974, the undersigned will move this Court in Room 3004, United States Courthouse, Foley Square, City, County and State of New York, on July 29, 1974, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order (1) pursuant to Rule 9(m) of the General Rules of the

United States District Court for the Southern and Eastern Districts, granting reargument of defendant-counterclaimant Melanie Schekeryk's motion for summary judgment on the second and third counterclaims interposed in her answer, and upon such reargument (A) reversing its Opinion, Order and Judgment, and granting summary judgment in favor of plaintiff-counterdefendant Kama Rippa Music, Inc.; or, in the alternative, (B) modifying the Court's Opinion, Order and Judgment to include compensation to plaintiff-counterdefendants for their expenditures with respect to the increased value of the copyrights ordered to be reverted to defendant-counterclaimant Melanie Schekeryk and, in the event this Court adheres to its Opinion, Order and Judgment, granting summary judgment on the second and third counterclaims interposed in defendant-counterclaimant Melanie Schekeryk's answer, (2) pursuant to the provisions of Rule 62(h) of the Federal Rules of Civil Procedure, staying enforcement of the Court's Order upon reargument until entry of judgment after appeal by the United States Courts of Appeals for the Second Circuit, together with such other and further relief as to the Court may appear just and proper.

Dated: New York, New York
July 26, 1974

Yours, etc.,

EMIL, KOBRIN, KLEIN & GARBUS
Attorneys for Plaintiff-Counter-defendants

By _____
A Member of the Firm

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

--and--

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

AFFIDAVIT

73 Civ. 3789

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FRED J. HALSEY, JR., being duly sworn, says:

1. I am an attorney admitted to practice before the Bar of this Court. I submit this affidavit, together with the annexed exhibits, in support of the motion, pursuant to Rule 9(m) of the General Rules of the United States District Court for the Southern District of New York, by plaintiff-counterdefendant, Kama Rippa Music, Inc. ("Kama Rippa"), for leave to reargue the Court's decision, dated June 17, 1974, granting summary judgment to defendant-counterclaimant, Melanie Schekeryk ("Melanie"), on the second and third counterclaims interposed in her answer,

and upon such reargument, for an order reversing its decision and granting summary judgment to Kama Rippa on those counterclaims.

2. Alternatively, if this Court adheres to its decision, it should modify it to include compensation to the plaintiff-counterdefendants for their expenditures with respect to the increased value of the copyrights reverted to Melanie.

3. This affidavit, and its exhibits, is also submitted in support of Kama Rippa's motion, pursuant to Rule 62(h) of the Federal Fules of Civil Procedure, for an order staying enforcement of the Court's Order upon reargument until entry of judgment upon appeal to the United States Court of Appeals for the Second Circuit.

SUMMARY OF ARGUMENT

4. This Court should grant Kama Rippa's motion to reargue and, thereafter, reverse its decision and deny summary judgment to Melanie. The consideration of a written instrument is always open to inquiry, and a party may show that the design and object of an agreement was different from what the language, if alone considered, would indicate.

5. Consideration of the annexed affidavits of the parties who negotiated the agreements in question, as well as experts and authorieies in the field of the music recording business who can attest to the custom of that industry, clearly raise for the Court's determination material and genuine issues of fact.

6. Thereafter, this Court should grant summary judgment to Kama Rippa on the second and third counterclaims contained in the Melanie Answer because of the uncontroverted fact raised by Arthur Kass that the parties intended, by their conduct

and actions after execution of the various agreements, to waive a right to reversion based on untimely royalty payments.

7. The Court must also modify its opinion to include compensation to plaintiff-counterdefendants for their joint efforts and expenditures which resulted in the conversion of Melanie's relatively valueless lead sheets at the time of production into valuable copyrights at this time.

8. Finally, if after reargument this Court adheres to its earlier decision, it should grant a stay of enforcement thereof pending appeal, inasmuch as, by Kama Rippa's prompt and expeditious processing of an appeal, together with establishment of an escrow account pending determination of the appeal, Melanie's judgment would be secure.

ARGUMENT

MOTION PURSUANT TO RULE 9(M)

A. Motion To Reargue and Reverse the Granting of Summary Judgment In Favor of Melanie.

9. The facts of this case simply do not support a finding that there are no material genuine issues of fact regarding Melanie's right to receive royalty payments. In point of fact, there are many material genuine issues of fact in this connection including, inter alia, the true intention of the parties regarding (1) the execution and negotiating of the Songwriter's Agreement; (2) the use of riders to the Songwriter's Agreement; (3) the designed interrelation of the Songwriter's Agreement and the Amendatory Agreement; and (4) the intention of the parties, as reflected by their actions, in waiving Melanie's right to royalty payments subsequent to execution of the various agreement.

10. For example, in connection with the negotiation and execution of the Songwriter's Agreement and its riders, only four people have first-hand knowledge of what went on during those negotiations. The four people with this first-hand knowledge are, on behalf of plaintiff and its affiliated companies, Messrs. Arthur Kass ("Kass") and Joseph Zynczak, Esq. ("Zynczak"), and on behalf of Melanie, Messrs. Stanley R. Poses ("Poses") and Howard Beldock, Esq. ("Beldock").

11. Three of those parties with first-hand knowledge, Kass, Zynczak and Poses, have averred unequivocally that their intention in negotiating and executing the Songwriter's Agreement and its riders was to make royalty payments to Melanie contingent upon the full and complete performance by Melanie of her obligations pursuant to various agreements between her and the other parties. The affidavits of Kass, Zynczak and Poses are annexed, respectively, as Exhibits "A", "B" and "C".

12. The single party with first-hand knowledge of the negotiation and execution of the Songwriter's Agreement and its rider who has not executed an affidavit attesting to the intent of that agreement is Beldock who has invoked the client/attorney privilege in light of his former representation of Melanie and Peter Schekeryk. Beldock has, however, executed a letter to this effect, a copy of which is annexed as Exhibit "D".

13. Moreover, that the intentions of Kass, Zynczak and Poses, as expressed in their annexed affidavits, in negotiating the Songwriter's Agreement and its riders are commonplace and consistent with the normal business practices of the music recording industry is corroborated by the annexed affidavits of Morris Levy ("Levy"), President of Roulette Records, annexed as

Exhibit "E", Philip Kahl ("Kahl"), Vice President of Big Seven Music Corporation, annexed as Exhibit "F", Jeffrey A. Franklin ("Franklin"), President of American Talent International, Ltd., annexed as Exhibit "G", and Irwin Schuster ("Schuster"), Vice President and Director of Professional Activities of Screen Gems, Columbia and Colgems Music, annexed as Exhibit "H". Each of these affiants is unquestionably familiar with the common and usual practices of the music recording industry.

15. The annexed affidavits also raise for the Court's consideration and resolution the genuine and material question of fact concerning the parties intended interrelation of obligations, as set forth in the Songwriter's Agreement and the Amendatory Agreement. Based on the Kass, Zynczak and Poses affidavits, it is quite clear that the intention of the parties who negotiated the agreements was that the agreements were in fact interrelated and the payment of royalties to Melanie was clearly contingent upon her full performance of her contractual obligations. And, as clearly reflected in the annexed Levy, Kahl, Franklin and Schuster affidavits, this understanding of the interrelation of the obligations of the parties is consistent with the common and ordinary trade practices in this respect.

16. Of course, there also exists a significant material issue of fact regarding satisfaction of Melanie's obligations pursuant to the 1971 Amendatory Agreement. This fact was correctly noted by the Court in its opinion. However, it is submitted, the Court did not take into consideration, because of the absence of other evidence submitted in connection with the motion originally, the existence of related material factual issues.

17. For example, evidence was not originally sufficiently presented to the Court regarding the satisfaction of Melanie's recording and releasing obligations. It is uncontested that Melanie has recorded and delivered to Kama Rippa, pursuant to the Songwriter's Agreement and the Amendatory Agreement, merely three domo renditions.

18. This deficiency has been cured by the Kass, Zynczak and Poses affidavits which clearly aver that the delivery of three deomonstration items does not satisfy the "record" obligation of the Agreements, much less the "record and release" obligations thereunder. In point of fact, according to the affidavits of Levy, Kahl, Franklin and Schuster these demonstration reproductions are relatively valueless commercially and have a limited use, e.g., to show in a general way the nature of the composition.

19. Additionally, the Kass, Zynczak and Poses affidavits now properly raise for the Court the material question of the timely performance of Melanie's obligations to release her renditions. Additionally, the affidavits of Levy, Kahl, Franklin and Schuster for the first time advise the Court of the normal trade practices in this industry and corroborate the argument of Kama Rippa that Melanie was obligated to record three renditions suitable for national release.

20. In light of the foregoing the conclusion is inescapable that this Court must recognize the existence of material and genuine issues of fact. Scheduling of trial combat at this time will not suggest the ultimate victor but, rather, will only lead to fairness and justice. This principle is particularly true where, as here, the credibility of the concerned parties is of the utmost importance.

B. Cross-Motion For Summary Judgment In Favor of Kama Rippa On the Second and Third Counterclaims.

21. The conduct and practices of Melanie and her agents and representatives regarding the parties' prior history and practice of making payment prior to the commencement of this action has led to a waiver of Melanie's right to reversion of the copyrights.

22. This factual situation was presented squarely to the Court by the original Kass affidavit in opposition to Melanie's motion, and is again raised by the affidavit of Martin Garbus, Esq. ("Garbus"), a copy of which is annexed as Exhibit "I". The Garbus affidavit shows quite clearly that this Court has no reasonable alternative but to decide that it was the intention of the parties to waive the priority status of royalty payments.

23. In this connection, the Court heretofore had evidence presented by the Kass affidavit in opposition to Melanie's motion to this effect which went uncontroverted in Melanie's reply papers. That is, at paragraphs 12 through 15, Kass averred, and Garbus now corroborates, that the conduct of Peter Schekeryk and Melanie in attempting to negotiate repurchase of the copyrights outright, mitigated against the invocation of the reversionary clause of paragraph 6 and its rider by the April, August and September, 1973 letters, and was not intended by those letters to cause a reversion of copyrights.

24. In light of the foregoing facts, this Court, in addition to reversing its decision to grant summary judgment to Melanie must grant Kama Rippa summary judgment in this connection.

C. Motion to Modify. 440A

25. The Kass affidavit, annexed as Exhibit A, fully sets forth the collective effort and expenses of the counter-defendants in making Melanie a successful and popular recording artist.

26. This consideration is most significant when it is noted that prior to becoming associated with the counterdefendants, Melanie had not had a single successful record. Since her association with plaintiff-counterdefendants, on the other hand, Melanie has become a successful artist with the result that her original lead sheets of questionable value have become valuable copyrights.

27. Accordingly, the Court must modify its earlier decision to reflect the inequity of ordering the copyrights to revert to Melanie at this time without appropriate compensation to Kama Rippa and the other counter-defendants.

MOTION PURSUANT TO FED. R. CIV. P. 62(H)

28. In the event this Court decides to adhere to its earlier decision in all respects, Kama Rippa moves for a stay of enforcement of the Court's opinion pending determination of an expeditious appeal to the United States Court of Appeals for the Second Circuit.

29. This procedure will not be prejudicial to Melanie, in view of the nature and seriousness of the effect of the Court's decision, for two reasons.

30. First, shortly after service and filing of this motion, Kama Rippa will file its notice of appeal from the Court's

opinion and seek expeditious handling of the appeal by the Appellate Court. A copy of the notice of appeal to be filed in this connection is annexed as Exhibit "J".

31. Additionally, the benefits to Melanie resulting from this Court's decision will be protected if this Court's decision is affirmed on appeal by reason of the fact that, pursuant to the Order and Judgment entered in connection with the Court's opinion, all sums of money purported to be due from Kama Rippa will be deposited in an interest-bearing bank account from which Kama Rippa will not be able to withdraw funds in the absence of consent from the Court and/or Melanie, or her agents.

CONCLUSION

32. In light of the foregoing facts, it is clear that the Court must grant Kama Rippa's motion for leave to reargue Melanie's motion for summary judgment, and upon rehearing reverse its decision granting summary judgment on the second and third counterclaims because of the existence of genuine questions of significant and material facts. Moreover, with respect to the reversion of copyrights to Melanie, this Court should reverse its decision and grant summary judgment in favor of Kama Rippa on the second and third counterclaims by reason of the uncontroverted facts alleged by Kama Rippa regarding the waiver by Melanie of her right to reversion.

33. Additionally, this Court must modify its opinion and compensate Kama Rippa and the other counterdefendants for the increase in value of Melanie's copyrights caused by the efforts and financial help of plaintiff-counterdefendants in this connection.

34. Finally, in the event the Court chooses to adhere to its opinion, it should grant a stay of enforcement of its Order and Judgment upon rehearing pending a decision by the United States Court of Appeal for the Second Circuit because the facts and circumstances of the effect of the Court's decision warrant this relief and Melanie will not be prejudiced by the granting of the relief at this time.

FRED J. HALSEY, JR.

Sworn to before me this
26th day of July, 1974.

Notary Public

HELENE CAROL SCHECHTMAN
Notary Public State of New York
No. 41-8765779
Qualified in Queens County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

443A

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KAMA RIPPA MUSIC, INC., :

Plaintiff, :

-against- :

MS. MELANIE SCHEKERYK, et al., :

Defendants. :

----------x

Exhibit A

AFFIDAVIT

73 Civ. 3789

(Judge Knapp)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ARTHUR KASS, being duly sworn, says:

1. I am the president of Kama Rippa Music, Inc., plaintiff herein, and of Buddah Records, Inc., one of the counter-defendants herein, and I make this affidavit in support of the motion by the plaintiff-counterdefendants for a rehearing on, and reargument of, the Opinion of this Court dated June 17, 1974, and also in support of such parties' motion for modification of this Court's Order pursuant to such Opinion.

MOTION FOR REHEARING

2. I respectfully submit, based on the intention of the parties to the agreements at issue in this lawsuit, as buttressed by definitive industry practice, that this Court should reverse its decision granting summary judgment to the defendants-counterclaimants on the second and third counter-claims interposed in their Answer.

3. As the president of plaintiff, I was actively involved in the negotiation of the three 1968 agreements and of the August 24, 1971 amendatory letter agreement which are in issue in this lawsuit.

4. Our intention in connection with the three 1968 agreements was that this entire set of documents embody a complex set of interrelated rights and obligations. Thus, all three agreements were negotiated and signed at the same time.

5. I can unequivocally state that when I agreed to the negotiated change reflected in the rider to paragraph 6 of the Exclusive Songwriter's Agreement (the "Songwriter's Agreement"), I did not intend it, nor did I understand it, to create an absolute obligation of payment.

6. Other parts of the Songwriter's Agreement bear out that the payment obligation in paragraph 6 was not absolute, but was contingent on performance by Melanie of her obligations under the various agreements. Thus, for example, if she breached her warranties of originality, we might withhold royalties. Similarly, if she failed to meet the requirements of paragraph 14, she would be in material breach, relieving us of our obligation to pay royalties pending her curing of such a material breach.

7. These two examples of situations in which we could withhold royalty payments were not cross-referenced in the rider to paragraph 6 because the parties negotiating the rider knew such cross-referencing was unnecessary. We all intended and understood that plaintiff's obligation to pay royalties to Melanie in general was contingent upon her fulfilling all of her obligations under the various agreements.

8. Furthermore, when I agreed to the contents of the rider to paragraph 6, I did not intend, nor did I understand, that if payments were not made on a specific date, and regardless of any injuries suffered by Melanie, all copyrights would revert to her. I would never agree to such an extreme and unreasonable penalty given that it was the efforts of our companies which turned worthless leadsheets into valuable compositions.

9. As for the fact that certain negotiated changes are included in riders, this fact does not give the contents of those riders any greater or lesser significance than any of the other terms in the agreements. In the Songwriter's Agreement, at the end of paragraph 1, a change is indicated with xx, and the substance is written in by hand at the bottom of the page. A one-word change was indicated with an asterisk in paragraph 2(C) of the Songwriter's Agreement. A change in paragraph 10(A) was indicated with an asterisk, with the contents typed in at the bottom of the page. Similar examples can be noted merely by looking at the agreements. In short, negotiated changes were indicated in a number of ways as expeditiously as possible without going to the bother of retyping the entire agreement, but the use of riders was merely a time-saving device; it was not intended to set the content of the riders apart from the rest of the agreements.

10. When we entered into the August 24, 1971 Amendatory Letter Agreement (the "Amendatory Agreement"), we clearly understood that the Amendatory Agreement was an amendment of two of the 1968 agreements, and was to be read in conjunction with them. We therefore provided that delivery of the additional 20 compositions was to be made "under and pursuant to" these two 1968 agreements. Again, this use of incorporation by reference saved time and was simpler than reciting all the terms and conditions of the two 1968 agreements.

11. Since the Court has indicated that it will take testimony on the meaning of the word "record" in the Amendatory Agreement, I do not wish at this time to belabor the Agreement. I should note, however, that the word "record" in the record industry means a commercial recording; it does not

mean a demonstration recording, which is normally referred to as a "demo."

12. When I received Mr. Peter Thall's June 27, 1973 letter, which is annexed as an exhibit to the January 25, 1974 Supplemental Affidavit by Sandor Frankel, I realized that Melanie was about to repudiate her obligations under the Amendatory Agreement. I therefore instructed our counsel, Martin Garbus, to attempt to work something out so that Melanie would fulfill her obligations under the Amendatory Agreement. Although Mr. Garbus attempted in a series of phone calls and letters to convince Melanie to retract her repudiation, she refused to do so, and on August 16, 1973, Mr. Thall sent me a final letter again confirming Melanie's repudiation. A copy of that August 16 letter is attached hereto as Exhibit 1.

MOTION FOR MODIFICATION OF ORDER

13. The balance of this affidavit is submitted in support of plaintiff's motion to modify this Court's Order pursuant to its Opinion, dated June 17, 1974.

14. Thousands of "popular" musical compositions are written and copyrighted every year. Of these thousands, however, only a tiny fraction achieve any mass popularity which is the basis for significant financial returns.

15. In the year 1973, according to Billboard magazine, one of the trade journals in the music industry, a mere 596 songs reached the top 100 in popularity during the entire year. Of these, many did not even recoup their recording costs, appearing on the nether regions of the chart and then disappearing.

16. Billboard also lists the top 200 long playing records and tapes each week. During the entire year 1973, only 778 different albums reached the top 200 in popularity.

17. By far the greatest income from a popular musical copyright is derived from a recording of the musical composition protected by the copyright. Taking as an example the publishing royalty statement to Melanie for the period January 1, 1973, through June 30, 1973, a copy of which is annexed hereto as Exhibit 2, the total amount payable to Melanie was $79,436. Nearly all of this amount, $77,944, was derived from worldwide mechanical licensing fees (sums payable by a recording company to a licensing agent such as the Harry Fox Agency, for the right to record the musical composition). Only $1,491.95 was actually obtained from publishing various forms of sheet music of Melanie's musical compositions.

17A. For this same period, Buddah Records, Inc. received ASCAP royalties (derived from the performance of a recording over radio or television) of $5,053.81. See Exhibit 3 attached hereto. As a writer, Melanie would receive twice this amount (since half of the publisher's share of ASCAP royalties is being paid to Amelanie Music, plaintiff's co-publisher and Melanie's alter ego), or $10,107.62. Thus, without even taking account of foreign performing rights royalties which would further increase the disparity, recordings of Melanie's compositions generated $88,051 compared to $1,491.95 from the publication of sheet music.

18. Although rough on an artist's ego, the fact is that a hit record is not created solely by the artist's performance or the material recorded (although both are important since it is extremely difficult, although not impossible, to turn a disaster into a success). A hit record is created by both the artist and the quality and knowledge of a record company's staff, people who create advertising campaigns, who are out in the field promoting and obtaining air time for a recording.

19. Buddah Records, Inc., had the business expertise, and a skillful staff, which together were able to turn Melanie into a major popular recording artist. Prior to coming to Buddah, she was with Columbia Records, Inc. She did not have one gold record during the time she was with Columbia Records (a "gold record" indicates that a single or an album is a "hit," having sold at least one million singles). While she was with Buddah, she had one gold album and one gold single. She won awards throughout the country and was considered one of the country's leading singers.

20. Once a record is a hit, the expertise of a music publisher becomes vital. The publisher must judge the best time to release sheet music, when to turn the music into folios, which compositions to include in a folio, what art work will best sell the published music, and a myriad of other crucial decisions. This we did while she was with us and after she left us and after this suit was filed. We also had her songs (which are the subject of the copyright) recorded by dozens of other artists. We created a vast source of income for her by getting her compositions recorded by prestigious artists in all fields.

21. Plaintiff had the staff and expertise to capitalize on Melanie's hit recordings and to turn them into valuable publishing commodities.

22. In short, Melanie delivered leadsheets of musical compositions which were basically valueless. She is not seeking reversion of extremely valuable copyrights. Although such a penalizing reversion should not be permitted, if it is permitted, she should first be required to reimburse Buddah and plaintiff for the costs and expenses which they have incurred in creating value in the copyrights.

23. These expenses, all of which are the subject of precise proof, incurred since May 1968, include:

(a) Advertising for Melanie recordings and compositions (includes advertising in all media, radio, television, trade journals and special interest newspapers and magazines: in excess of $ 250,000

(b) Reasonable allocation of salaries of A&R people ("A&R" people are "artists and repertory" personnel who are responsible for finding, developing, advising and promoting talent); Reasonable allocation of salaries of field men ("field men" are responsible for contacting program managers and other radio and television personnel in order to obtain air time for a recording); Reasonable allocation of travel and entertainment expenses; Reasonable allocation of overhead expenses: in excess of $ 750,000

24. Equity doesn't exist in a vacuum. Melanie during the entire term of her agreement as a Songwriter never acted fully in good faith. Contrary to agreements, she failed to promptly deliver lead sheets for songs written, she always failed to fully disclose what compositions she had written during the term, she never promptly executed agreements to assign copyrights, she failed to cooperate in the production of her song folio, she would not pose for photographs needed to be used for her song exploitation. Yet the Court overlooks this and penalizes us.

Arthur Kass
ARTHUR KASS

Sworn to before me this
3/ day of July, 1974

Anne E. Mendelson

ANN E. MENDELSON
NOTARY PUBLIC, State of New York
No. 41 2653865
Qualified in New York County
Commission Expires March 30, 1975

450A

Robert L. Casper, P. C.
Law Offices

1780 BROADWAY
NEW YORK, N. Y. 10019

(212) 765-5038
TELEX, 422984
CABLE: CASPERESQ NEW YORK

ROBERT L. CASPER
PETER M. THALL

August 16, 1973

Kama Rippa Music, Inc.
810 Seventh Avenue
New York, New York

Attention: Mr. Arthur Kass

Re: Melanie Safka Schekeryk

Gentlemen:

Further to my letter of June 27, 1973 regarding the delivery agreement between you, Amelanie Music, Melanie and Peter Schekeryk, dated August 24, 1971, I am enclosing for your information and use for demonstration purposes only to promote the musical compositions contained thereon, the 7-1/2" tape recording, half-track (transferred from 16 track), which I referred to in that letter.

Of course, you shall have no rights in the masters or in the performances of Melanie contained thereon or on the enclosed copy of the tape.

Very truly yours,

Peter M. Thall

PMT:gr
Enc.
REGISTERED MAIL,
RETURN RECEIPT REQUESTED.
cc: Mr. Peter Schekeryk
Mr. Isador D. Schachter

Exhibit 1

(PAGE 1)
Page 1-Original
Page 2-Copy
Page 3-Duplicat

☐ KAMA SUTRA MUSIC, INC
☐ BUDDAH MUSIC, INC.
810 SEVENTH AVENUE, NEW YORK, N.Y. 10019
(212) 582-6900

MELANIE SAFKA
c/o AGAC

FROM			TO		
1	1	73	6	30	73

451A

WRITER'S

ROYALTY STATEMENT

COMPOSITION		S/S UNITS	Mechs.	%	SHARE
AGAIN			1,202.56	.50	601.28
ALL THE RIGHT NOISES			689.21	.4875	335.93
ANIMAL CRACKERS			704.13	.50	352.07
ANOTHER SIDE OF MELANIE		4407		.20	881.40
ANY GUY			2,984.79	.50	1,492.40
BABY GUITAR			2,327.01	.50	1,163.51
BABE RAINBOW			3,381.14	.50	1,690.57
BIRTHDAY OF THE RAIN			387.46	.50	193.73
BIRTHDAY OF THE SUN			1,706.71	.50	853.36
BOBO'S PARTY			91.96	.50	45.98
CANDLES IN THE RAIN			877.00	.50	438.50
CITIEST PEOPLE			4,772.66	.50	2,386.33
CLOSE TO IT ALL			62.81	.50	31.41
DEEP DOWN LOW			732.71	.50	366.36
" " "			5.42	.50	2.71
DO YOU WAIT BY THE WATER			535.83	.50	267.92
EARS TO THE GROUND			1,234.31	.4875	601.73
FOR MY FATHER			1,232.48	.50	616.24
GOOD BOOK			3,779.31	.50	1,889.65
" "		1703		.25	452.00
GOOD GUYS			5,850.80	.50	2,925.40
I DON'T EAT ANIMALS			1,994.57	.50	997.29
I REALLY LOVED HAROLD			694.27	.50	347.14
I'M BACK IN TOWN			764.07	.50	382.04
IN THE HOUR			588.17	.50	294.09
ISN'T IT A PITY			1,360.92	.50	680.46
JIG SAW PUZZLE			535.33	.50	267.92
JOHNNY BOY			2,377.86	.50	1,189.02
LAY DOWN (CANDLES IN THE RAIN)			20,825.00	.50	10,412.50
LEFTOVER WINE			6,458.60	.50	3,229.30
LOVIN' BABY GIRL			4,440.49	.50	2,220.24
MERRY CHRISTMAS			345.10	.50	172.60
MIAN MONA			1,131.90	.50	565.95
MY BONNIE LIES OVER			5.86	.4875	2.94
NICKEL SONG			13,606.51	.50	6,703.26
PEACE WILL COME			9,182.58	.50	4,591.29
PEBBLES IN THE SAND			736.26	.4875	358.14
PLEASE POUR ME			2,584.45	.50	1,292.23
" " "			168.04	.50	84.02

Exhibit 2

452A

(PAGE 2)

Page 1-Original
Page 2-Copy
Page 3-Duplicate

KAMA SUTRA MUSIC, INC

BUDDAH MUSIC, INC.
810 SEVENTH AVENUE, NEW YORK, N.Y. 10019
(212) 582-6900

FROM	TO

WRITER'S

ROYALTY STATEMENT

COMPOSITION		S/M UNITS	Mechs.	%	SHARE
PEOPLE IN THE FRONT ROW			535.83	.50	267.92
THE PRIZE			1,292.60	.50	646.30
THE SADDEST THING			3,026.99	.50	1,513.50
SAVE THE NIGHT			630.71	.4875	307.47
TAKE ME HOME			1,302.78	.50	651.39
TUNING MY GUITAR			3,308.51	.50	1,654.26
UPTOWN DOWN			3,211.34	.50	1,605.67
WHAT HAVE THEY DONE			40,690.59	.50	20,345.30
" " " "		3093		.05	154.14
" " " "		44		.10	4.40
YOU CAN GO FISHING			1,265.05	.50	632.53
GETTING OUT			540.84	.50	270.42
				TOTAL	79,436.06

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Payment Paid Foreign
ASCAP
for period 1/1/73 to 6/30/73

	Commission	1st Qtr 73 Credits	1st Qtr 73 Amt	2nd Qtr 73 Credits	2nd Qtr 73 Amt
			Rate .8581		Rate .9795
2	LAT. DOWN	29412	24859	29210	28611
4	LATIN SONG	40646	34590	27605	27039
6	PEACE, MISC. COMP.	25993	22112	26161	25625
8	MISC. LATIN SONG	244019	207660	137705	134925
10			289271		216160
15	TOTAL LICENSED	544917			
17	TOTAL ISSUED FOR MISC. LATIN	505361			

Exhibit 3

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

PUBLISHER PERFORMANCE RECORD
RADIO, TELEVISION AND † WIRED MUSIC

SEPT. DISTRIBUTION 1973

PERFORMANCES
JAN. 1, 1973 - MAR. 31, 1973

NAME: KAMA RIPPA MUSIC INC

MEMBER CODE: 0735430

TITLE	TITLE CODE	SHARE %	RADIO CREDITS	TELEVISION CREDITS	WIRED MUSIC † CREDITS	TOTAL CREDITS
CHILDREN GET TOGETHER	33-018536	50	117.818			117.818
LAY DOWN M	42-025567	50	292.118			292.118
MINE ALL MINE	43-020958	50	57.519			57.519
NICKEL SONG M	44-007314	50	406.455			406.455
PEACE WILL COME ACCORDING M	46-012925	50	27.819	232.010		259.829 ✓
POOR DANIEL	46-014112	50	19.173			19.173
SOMEDAY	49-029416	50	19.173			19.173
SONGMAN	49-029114	50	28.203			28.203
TOMORROW	50-020940	50	52.840			52.840
WHAT HAVE THEY DONE TO MY S M	53-016466	50	1189.173	1251.016		2440.189 ✓
PERFORMANCE TOTALS			2210.291	1483.026		3693.317

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† INCLUDES WIRED MUSIC AND SIMILAR SERVICES

PUB 3-73

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

PUBLISHER PERFORMANCE RECORD
RADIO, TELEVISION AND † WIRED MUSIC

DECEMBER DISTRIBUTION 1973

PERFORMANCES
APRIL 1, 1973 -JUNE 30, 1973

NAME KAMA RIPPA MUSIC INC

MEMBER CODE 0735430

455A

TITLE	TITLE CODE	SHARE %	RADIO CREDITS	TELEVISION CREDITS	WIRED MUSIC † CREDITS	TOTAL CREDITS	
I HEARD THE VOICE OF JESUS	09-002432	50	1.917			1.917	
MY SAVIOR LIVES	13-004246	50	10.600			10.600	
LAY DOWN M	42-015567	50	264.922	27.182		292.104	✓
NICKEL SONG M	44-007314	50	276.051			276.051	✓
PEACE WILL COME ACCORDING M	46-012925	50		261.611		261.611	✓
SOMEDAY	49-029416	50		81.340		81.340	
TOMORROW	50-020940	50	32.038			32.038	
WHAT HAVE THEY DONE TO MY S M	53-016466	50	625.585	751.490		1377.075	✓
PERFORMANCE TOTALS			1211.113	1121.623		2332.736	

† INCLUDES WIRED MUSIC AND SIMILAR SERVICES

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a/ AMELANIE MUSIC,

Defendants.

-and-

MELANIE and PETER SCHEKERYK, individually and d/b/a/ AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.

Counterdefendants.

456A

Exhibit B

AFFIDAVIT

73 Civ. 3789

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOSEPH ZYNCZAK, Esq., being duly sworn, says:

1. I am an attorney, admitted to practice before the bar of the State of New York, and submit this affidavit in support of the motion by Kama Rippa Music, Inc., Kama Sutra Music, Inc., and Buddah Records, Inc. (plaintiff-conterdefendants) for leave to reargue the decision of this Court, dated June 17. 1974.

2. Upon such reargument, it is submitted, this Court should reverse its decision granting summary judgment to Ms. Melanie Schekeryk, Mr. Peter Schekeryk, individually and d/b/a Amelanie Music and Two People Music (defendants-counterclaimants)

on the second and third counterclaims interposed in their answer.

3. My legal practice has been in the field of representing producers and artists in the music entertainment industry for approximately seven years. A portion of my experience includes the period from 1968 through 1971 at which time I was vice president and general counsel for plaintiff-counterdefendants.

4. My experience and practice with plaintiff-counterdefendants during that period included the negotiation on behalf of Kama Rippa Music, Inc. of the Songwriter's Agreement ("Songwriter's Agreement") and the Co-Publishing Agreement, each dated May 31, 1968, and the Artist Recording Agreement, Dated October 28, 1968, the Recording Settlement Agreement of May 14, 1971 and the Amendatory Letter Agreement, dated August 24, 1971, with defendants-counterclaimants.

5. In addition to myself, the other party who represented plaintiff-counterdefendants in these negotiations was Art Kass.

6. The exclusive representatives for the defendants-counterclaimants during these negotiations regarding the Songwriter's Agreement were Howard Beldock, Esq., and Stanley Poses. Mr. Poses was, at that time, Melanie's personal manager, and Mr. Beldock was their attorney.

7. During the negotiations in question, Melanie herself was not present at any time during the discussions and merely appeared to execute the Songwriter's Agreement. Defendant-counterclaimant, Peter Schekeryk, was present during a portion of the negotiations but took no active part, as such, in the negotiations.

8. In light of the foregoing facts, I believe it would be accurate to state that I, together with Messrs. Beldock, Kass

and Poses, had exclusive knowledge of the negotiations which led to the execution of the 1968 Songwriter's Agreement and the rider to paragraph 6 thereof.

1968 SONGWRITER'S AGREEMENT AND RIDER

9. I have read the Court's decision and wish to advise the Court of the intention of the parties regarding negotiation and execution of the Songwriter's Agreement in general, and paragraph 6 and the rider thereto specifically.

10. The negotiations that took place in connection with the Songwriter's Agreement were ordinary and not the least bit unusual. The terms of the Songwriter's Agreement were discussed generally but at no time was it discussed that paragraph 6 and its rider were to be given significance independent of any other provision of that Agreement.

11. It was clear then as it is now that the obligations of that paragraph, and the annexed rider, were understood by all the parties to be interrelated to, and contingent upon, full and complete performance by the artist of all of the artist's obligations, including delivery requirements, contained in the Songwriter's Agreement.

12. This is true notwithstanding the fact that paragraph 6 is a rider and contains a "time is of the essence" clause. It is standard practice in the music industry to use riders to avoid retyping an entire agreement and thus to save time. However, merely because a reversionary clause such as this is in such a time-saving rider does not make it independent of the rest of the Agreement. For example, that clause was not intended to be independent of the delivery requirements set forth in paragraph 14 of the Songwriter's Agreement. I have read the Poses and Kass affidavits concerning the practice in the industry, the clause in question and the history of these negotiations. They are, in all respects, consistent with my recollection of the facts.

13. Also, the "time is of the essence" clause in paragraph 6 was not intended to imply that payments had to be made on a specific date. Preparing an accounting in the music industry is a complicated affair, and rarely are accountings available within 45 days after the close of an accounting period.

14. The Court's opinion correctly indicates that a person who does not receive royalties does not by and large suffer any real, lasting damage. All that the payor is required to do is pay money. Consequently, the time is of the essence clause indicated merely that the payor was to prepare an accounting on a top priority basis. It was never intended by me to mean that the failure to pay money on a specific date would precipitate a reversion of copyrights.

1971 AMENDATORY AGREEMENT

15. As indicated, supra, ¶ 4, I also took part in the negotiations which culminated in the execution of the Amendatory Agreement, dated August 24, 1971, among the parties.

16. I have been advised and understand that the Court already has found the existence of a question of fact regarding the interpretation and meaning of the August 24th Amendatory Agreement. Therefore, I will limit my comments in that connection.

17. Initially, it was my intention as well as the expressed intentions of all those who participated in the negotiations, that all of the agreements among the various parties were to be read together creating a complex set of reciprocal obligations. Thus, for example, it was my understanding of the facts, and my intention that payments of royalties to Melanie would be contingent upon her full and complete performance of her obligations under the respective agreements.

18. It was clearly my intention in negotiating the Amendatory Letter Agreement that Melanie release the compositions created and recorded by her.

19. A contrary intention on the part of the plaintiff-counterdefendants would make no sense from a practical business standpoint. There would be little value in having an artist-composer of Melanie's quality merely record and not release three compositions. The release by Melanie of her own renditions of her compositions substantially increases the publishing value of all of the musical works written by her and helps to reimburse the recording and publishing companies for the advances that had been made to Melanie by those companies in the early years of her career.

20. It is common knowledge in the popular music field that the publishing rights in compositions derive their value primarily from successful popular recordings. A hit record can sell an entire folio of the artist's compositions. Popular music publishers, in point of fact, frequently do not publish any sheet music by an artist-composer until that artist has had a hit record.

21. Consequently with a performer of Melanie's quality it is of the utmost importance to obtain her personal performance of the music compositions she creates. It is that performance which is ultimately of more value than the mere possession of written compositions to be performed by other unknown persons.

22. Timely delivery of the compositions and timely release of Melanie's recordings also were of the essence to the negotiating parties. The second paragraph of the Amendatory Letter Agreement states that delivery is to be made "under and pursuant to" the 1968 Songwriter's Agreement. The result of this

language is to incorporate all of the terms and conditions of that Agreement by reference. Paragraph 14 of the Songwriter's Agreement similarly makes timely delivery of the essence of the agreement.

CONCLUSION

23. The "time of the essence" in the music business means that everything must be done so that the artist delivers the material and the material gets out to the public while the artist is still a star. Weeks, days and months can be the difference. Payment of monies from a publicly listed company that is financially solid, as Buddah, has been for many years not "of the essence," as used by the Court.

24. In summary, I would reiterate that during the negotiations that culminated in the execution of the Songwriter's Agreement it was not the intention, either expressed or implicit, of any of the parties that paragraph 6 and its rider be given a status independent of the other portions of the contract, including the artist's delivery requirements pursuant to the Agreement.

25. Additionally, the 1971 Amendatory Agreement was intended by the parties to include the release, as well as the recording, of musical compositions produced by Melanie.

JOSEPH ZYNCZAK

Sworn to before me this
25 day of July, 1974.

Notary Public

MARIE'S COOPER
NOTARY PUBLIC, State of New York
No. 31 6457537
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants,

-and-

MELANIE AND PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

462A

Exhibit C

AFFIDAVIT

73 Civ. 3789

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

STANLEY R. POSES, being duly sworn, says:

1. I am presently self-employed in the business of the personal management of artists in the entertainment industry. I submit this affidavit in support of the motion by Kama Rippa Music, Inc., Kama Sutra Music, Inc., and Buddah Records, Inc. (plaintiff-counterdefendants) for leave to reargue the decision of this Court, dated June 17, 1974, and upon such reargument, to have this Court reverse its decision granting summary judgment to Ms. Melanie Schekeryk, Mr. Peter Schekeryk, individually and

d/b/a Amelanie Music and Two People Music (defendants-counterclaimants) on the second and third counterclaims interposed in their Answer.

FACTUAL BACKGROUND

2. I am now, and have been for approximately the last ten years, specialized in representing musical recording artists. My duties normally include the negotiation and execution of recording artists' agreements, publishing agreements and personal management agreements in the general field of music. Accordingly, my knowledge of the custom and trade of the music industry in general is extensive.

3. My personal knowledge of the parties involved in this litigation is also extensive inasmuch as I have known defendants-counterclaimants Ms. Melanie Schekeryk ("Melanie") and Peter Schekeryk ("Schekeryk") since approximately January, 1968.

4. Subsequently, after counseling Melanie in several business and personal matters (including arranging for the marriage of Melanie and Schekeryk to take place in my home), I became her personal manager in or about March, 1968.

5. More specifically, I am personally familiar with the negotiations and circumstances which led to the execution of the Songwriter's Agreement, Co-Publishing Agreement and the Artist Recording Agreement, each dated May 31, 1968. My knowledge is based on the fact that, together with Howard Beldock, Esq., I personally negotiated those agreements on behalf of the defendants-counterclaimants with Messrs. Arthur Kass and Joseph Zynczak, Esq., who represented plaintiff-counterdefendants at that time.

6. It is noteworthy, I believe, that I, together with Messrs. Kass, Zynczak and Beldock alone have personal knowledge of the negotiations.

7. I have reviewed the Court's opinion, dated June 17, 1974, as well as reread the Songwriter's Agreement and the Co-Publishing Agreement, each dated May 31, 1968, and the Artist Recording Agreement, dated October 28, 1968.

8. At the outset it should be noted by the Court that those agreements were meant to be read together with the result, inter alia, that payments of royalties to Melanie were contingent upon full and complete performance by the artist-composer of her obligations under the respective agreements.

9. This is true, and reflects the intentions of the negotiating parties, even though paragraph 6 is a rider and contains a "time is of the essence" clause. I personally have often used riders to avoid retyping an entire agreement and thus to save time and did so in this case also. The inclusion of a reversionary clause in the rider to paragraph 6 was not intended to make that paragraph independent of the rest of the Agreement. In particular, the clause was not intended to be independent of the delivery requirements set forth in paragraph 14 of the Songwriter's Agreement. It does not mean that upon failure to pay the royalties on a specified date the rights to the copyrights revert.

10. The "time is of the essence" clause, contained in the rider to paragraph 6, is a standard negotiated term conceded to major artists in the industry, but does not mean that payments have to be made on a specific date. Coordinating an accounting in the music industry is a complicated affair, and rarely can be

available within 45 days after the close of an accounting period. It is often months and years. All sides are aware that no one, except in unusual circumstances, is damaged by the non-payment. The Court, in its decision, finding that the Artist suffered no damage recognized that fact which is a known and accepted fact in the music industry.

11. Consequently, as was done with respect to Melanie, it was agreed that preparation of an accounting would be given a top priority basis. On the other hand, not one of those who negotiated the Songwriter's Agreement ever intended the failure to pay royalty money on a specific date to precipitate a reversion of copyrights.

12. I have read the Arthur Kass and Morris Levy affidavits to the extent that they deal with negotiation of this contract and the practices and standards of the industry. I agree with them. Paragraphs 5 and 8 of the Kass affidavit are in every way accurate.

13. At the time that the original agreements were entered into the copyrights were relatively valueless. But today they are worth a great deal of money. No one knew in 1968 what the value of those copyrights would be.

14. The reason why the royalty payment clause is related to the rest of the Agreement is that as Melanie performs her obligations, delivers her product and the record companies perform their obligations, the value of the copyrights increase, for they are directly related to the product not to the artist and the company alone. If Melanie delivers quality material on time, and if the record company does its job, a market is created for Melanie's product which is reflected in the value of the royalty. The royalty clause is not a dead, fixed clause - rather its value

changes often and regularly with the performance of the parties to the agreement.

14. The parties negotiating the agreement were fully aware that by using riders they were merely expediting the signing of the agreement rather than incurring the additional delay required in retyping the agreement. Had Melanie been of a different stature we might have signed an "original" contract. But we did not. We used "boilerplate" forms, language and agreements.

1971 AMENDATORY AGREEMENT

15. Based on my general experience and knowledge of the custom and trade of the business, and my personal knowledge of the parties and facts underlying the business relationship between the parties, I believe I am able to render a knowledgeable opinion concerning the effect of the 1971 Amendatory Agreement, although I was not a party to those negotiations that culminated in the execution of that agreement.

16. In my opinion, the 1971 Amendatory Agreement clearly contemplates and foresees the release of the three recordings by Melanie which are the subject matter of that agreement. Ohterwise, considering the artist-composer nature of Melanie, the agreement makes no real sense from a business standpoint.

17. There would be no balue to having Melanie merely record three songs if her renditions are not also to be released. The release of her performances would substantially increase the publishing value of all of the musical compositions written and delivered by her.

18. In the popular music field, the publishing rights in composition derive their value primarily from successful popular recordings. A hit record can sell an entire folio of the

artist's compositions. In fact, popular music publishers do not publish any sheet music by an artist-composer until that artist has had a hit record.

19. Thus, there is little value in having an artist-composer of Melanie's quality merely record three compositions. The release by Melanie of her recordings of her written compositions substantially increases the publishing value of all of the musical compositions written by Melanie pursuant to her agreements with plaintiff-counterdefendants. In fact, the release of the final three compositions helps to reimburse the recording and publishing companies for the advances that have been made to her by those companies in the early years of Melanie's career.

20. Timely delivery of the compositions and timely release of Melanie's recordings undoubtedly was clearly of the essence. This is corroborated by the language of the second paragraph of the Amendatory Letter Agreement which states that delivery is to be made "under and pursuant to" the 1968 Songwriter's Agreement, thereby incorporating all of the terms and conditions of that Agreement by reference. Paragraph 14 of that 1968 Agreement makes timely delivery of the essence.

21. In the interest of total disclosure to the Court, I wish to advise the Court that I am presently involved in a commercial action regarding my personal management contract with defendants-counterclaimants. However, I believe the recitation of facts hereinabove and the statement of my personal opinion are truthful and given to aid the Court in reaching a just and equitable decision. I had for a period of time been represented by the attorneys who presently represent Buddah and Kama Sutra, Inc.

Sworn to before me this
day of July, 1974

STANLEY R. POSES

Notary Public

[illegible] York
Qualified in Queens County
Commission Expires March 30, 1976

HOWARD N. BELDOCK
ATTORNEY AT LAW
110 EAST 59TH STREET · NEW YORK, N.Y. 10022
TELEPHONE: (212) 421-0300

Exhibit D

July 25, 1974

Martin Garbus, Esq.
Emil, Kobrin, Klein & Garbus
540 Madison Avenue
New York, New York 10022

Dear Martin,

As you know, I at times past represented Melanie and Peter Schekeryk in connection with transactions had with Kama Music and Buddah Records.

Under the circumstances, I would not deem it appropriate for me to submit any affidavits in connection with this matter as requested by your office.

I trust that you will understand my reluctance in view of the client/lawyer relationship which previously existed between these parties and myself.

Sincerely yours,

Howard N. Beldock

HNB:mg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

--and--

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Courterdefendants.

469A

Exhibit E

AFFIDAVIT

73 Civ. 3789

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MORRIS LEVY, being duly sworn, says:

1. I am President of Roulette Records, and submit this affidavit in support of the motion by Kama Rippa Music, Inc., Kama Sutra Music, Inc. and Buddah Records, Inc. (plaintiff-counterdefendants) for leave to reargue the decision of this Court, dated June 17, 1974.

2. Upon such reargument, it is submitted, this Court should reverse its decision granting summary judgment to Ms. Melanie Schekeryk, Mr. Peter Schekeryk, individually and d/b/a Amelanie Music and Two People Music (defendants-counterclaimants) on the second and third counterclaims interposed in their Answer.

3. I have been in the entertainment industry for approximately twenty years. At this time, I am President of several recording companies as well as several music publishing companies, including Plan ary Music Corp. and Patricia Music Corp. Accordingly, I believe my knowledge is extensive regarding the custom and trade of the entertainment industry in general, and the musical recording field in particular.

4. I was not involved personally with the negotiation and execution of the several interrelated agreements among the parties which exist in this action but, based on my experience and knowledge of the custom and trade of the business, I believe I am able to render an opinion concerning the effect of those agreements and their compatibility with the normal business and trade of the music recording field.

5. I have reviewed the Court's opinion, dated June 17, 1974, as well as the Songwriter's Agreement and the Co-Publishing Agreement, each dated May 31, 1968, and the Artist Recording Agreement, dated October 28, 1968, the Recording Settlement Agreement of May 14, 1971 and the Amendatory Letter Agreement, dated August 24, 1971.

6. Initially, it is my opinion, based on the usual custom and trade of the music recording industry, that the agreements are to be read together creating a complex set of reciprocal obligations. For example, in the music industry it is well understood, although frequently not spelled out, that payments of royalties to an artist or composer are contingent upon full and complete performance by the artist or composer of his or her obligations under the respective agreements.

7. It is also my opinion that the Amendatory Letter Agreement clearly contemplates the intended release of the three

recordings which are part of the subject matter of such Agreement. I have been advised and understand, however, that the Court has found ambiguity in the interpretation and meaning of the Amendatory Letter Agreement and, therefore, I will not discuss that Agreement at length except to make several pertinent comments.

8. It is clear, in my opinion, that the Amendatory Letter Agreement must contemplate the release of the recordings produced by defendant-counterclaimant Melanie Schekeryk ("Melanie" In my opinion the agreement makes no sense if it is claimed to be merely an agreement whereby Melanie is obligated to record, and not to release, three written compositions.

9. In the popular music field, the publishing rights in compositions derive their value primarily from successful popular recordings. If there are 20 compositions in a folio, and if even one of the compositions is on a successful commercial recording, the hit recording of the one song helps to sell the entire published folio.

10. Demonstration records, or "Demos," as they are called in the trade, are relatively valueless, their purpose being merely to indicate in a very rough and general way the nature of the composition. Standing by themselves, they have little monetary value.

11. Thus, there would be little value in having an artist-composer of Melanie's stature merely prepare demos of three compositions. The release of 3 commercial recordings by Melanie of her written compositions, however, would, due to her standing as a popular star, substantially increase the publishing value of all of the musical compositions written by Melanie pursuant to her agreements with plaintiff-counterdefendants. In fact, particularly if any of the recordings were a success, the release of the

final three recordings would help to reimburse the recording and publishing companies for the advances that have been made to her by those companies in the early years of Melanie's career.

12. With a performer of Melanie's quality, it is of the utmost importance to obtain her personal performance of the music compositions she creates. It is that performance which is ultimately of more value than the mere possession of written compositions to be performed by other unknown persons.

13. Timely delivery of the compositions and timely release of Melanie's recordings are clearly of the essence. The second paragraph of the Amendatory Letter Agreement states that delivery is to be made "under and pursuant to" the 1968 Songwriter's Agreement, thereby incorporating all of the terms and conditions of that Agreement by reference. Paragraph 14 of that 1968 Agreement makes timely delivery of the essence.

1968 SONGWRITER'S AGREEMENT AND RIDER

14. I have also reviewed the Songwriter's Agreement and the rider annexed to paragraph 6 thereof concerning the possible reversion of copyrights to Melanie's written compositions.

15. In my opinion, based on my experience in the music recording business, it is clear that the obligations of that paragraph, and the annexed rider, were understood to be interrelated to, and contingent upon full and complete performance by the artist of, all of the artist's obligations, including delivery requirements, in the Songwriter's Agreement.

16. This is true even though paragraph 6 is a rider and contains a "time is of the essence" clause. It is standard practice in the music industry to use riders to avoid retyping an entire agreement and thus to save time. However, merely because

a reversionary clause such as this is in such a time-saving rider does not make it independent of the rest of the Agreement. In particular, the clause is not independent of the delivery requirements set forth in paragraph 14 of the Songwriter's Agreement.

17. The time is of the essence clause in paragraph 6, a standard negotiated term conceded to major artists in the industry, does not mean that payments have to be made on a specific date. Putting together an accounting in the music industry is an incredibly complicated affair, and rarely are accountings available even sixty days, must less 45 days, after the close of an accounting period. As the Court's opinion itself indicates, the person who does not receive royalties does not by and large suffer any damage. All that the payor is required to do is prepare the accounting on a top priority basis. But no one would ever construe the failure to pay money on a specific date as precipitating a reversion of copyrights.

MORRIS LEVY

Sworn to before me this
25 day of July, 1974

Notary Public

MARTIN [illegible]
NOTARY PUBLIC, State of New York
No. 31-6457537
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Exhibit F

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, ET AL.,

Defendants.

73 Civ. 3789
(Judge Knapp)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PHILIP KAHL, being duly sworn, says:

1. I am Vice President of the Big Seven Music Corp., and give this affidavit in support of plaintiff Kama Rippa Music, Inc.'s motion for reargument of this Court's opinion dated June 17, 1974.

2. I respectfully submit that upon such reargument, this Court should reverse its decision granting summary judgment to defendants on the second and third counterclaims interposed in their Answer.

3. I have been in the music publishing field for over twenty years. I have been affiliated with the music publishing division of the Walt Disney organization and with Edwin H. Morris & Co., Inc., one of the giants in the music publishing field. I am currently Vice President and Managing Director of Domestic and Foreign Operations of the Big Seven Music Corp. Accordingly, I believe my knowledge of the custom and trade of the music publishing industry is extensive.

4. I have read the Court's opinion, dated June 17, 1974, as well as the 1968 Exclusive Songwriter's Agreement (the "Songwriter's Agreement"), the 1968 Co-Publishing Agreement (the "Co-publishing Agreement"), and the 1971 Amendatory Letter Agreement (the "Amendatory Agreement").

5. I was not involved personally with the negotiations and signing of the Songwriter's Agreement, the Co-Publishing Agreement or the Amendatory Agreement at issue in this lawsuit, but, based on my experience and knowledge of the custom and trade of the music publishing business, I feel I can give an opinion about the interrelationship of those Agreements and the meaning which the music publishing industry would give to certain portions of those Agreements.

6. Initially, it is my opinion, based on the usual custom and trade of the music publishing industry, that the Agreements are to be read together reflecting the connection of various rights and obligations. For example, it is well understood, although frequently not spelled out, that payments of royalties to a composer are contingent upon full and complete performance by the composer of his or her obligations under the respective Agreements. If a songwriter who had an exclusive agreement with us delivered a composition to another music publisher, we would sue both the writer and such other publisher and would have the absolute right to withhold any further royalty payments to the composer until the litigation was over. No one in the industry would expect us to continue making payments to a writer in breach until the dispute was settled.

7. It is also my opinion that the Amendatory Agreement clearly intended the national commercial release of the 3 recordings Melanie was to deliver.

8. The use of the word "record" makes that clear. To "record" a composition is to undertake a fully arranged version of the music, with harmonics and full instrumentation including brass, string, rhythym, or any other instrumentation the arranger and/or producer might select. In short, to record a song is to turn it into a commercial product suitable for national release.

9. A demonstration record, referred to as a "demo", is entirely different. It involves a demostration of the composition usually played on a piano with a minimal rhythym section. To "record" a composition and to "prepare a demo" of the composition are two entirely separate and distinct obligations.

10. What Melanie delivered are clearly demos. They have her singing a melody to the accompaniment of only a piano. Her obligation "to record" 3 compositions is simply not met by these demos.

10-A. All the other "recordings" (that is, mixed-down master tapes) delivered by Melanie were fully arranged and produced commercial "recordings." By her own previous actions therefore, Melanie acknowledges the difference between the obligation to record and the obligation to prepare a demo.

11. In the popular music field, publishing rights derive their value primarily from successful popular recordings. A successful record promotes and makes it possible to sell an entire folio of an artist-composer's music.

12. Due to the superstar status which plaintiff and Buddah Records, Inc. have created for Melanie, the value in having Melanie record 3 of her compositions lay in the possibility that one or more might become a commercial hit recording. Such a hit might even become a standard and in any event would enhance the publishing value of the catalogue of songs she had written for plaintiff Kama Rippa, thereby helping to reimburse Kama Rippa and its affiliated companies for the advances that were made to Melanie by those companies in the early years of Melanie's career.

13. A demo would not increase the value of the music publishing rights in Melanie's works. Rather, it would create a great deal of additional work for Kama Rippa as Kama Rippa would

have to use the demo to try to induce other artists to record Melanie's compositions.

14. The liquidated damages would therefore make no sense if a demo had been intended. Why reimburse Kama Rippa for not having to undertake a great deal of additional work? The liquidated damages make sense only in light of an obligation to release nationally a commercial recording.

15. Timely delivery and release of the commercial recordings are clearly of the essence. The second paragraph of the Amendatory Agreement states that delivery is to be made "under and pursuant to" the Songwriter's and Co-Publishing Agreements, thereby incorporating all of the terms and conditions of those Agreements by reference. Paragraph 14 of the Songwriter's Agreement makes timely performance of the essence.

SONGWRITER'S AGREEMENT AND RIDER

16. I have also read the Songwriter's Agreement and the rider annexed to paragraph 6 thereof concerning the possible reversion of copyrights to Melanie's written compositions.

17. As I indicated in paragraph 6 above, in my opinion, based on my experience in the music publishing business, it is clear that the obligations of that paragraph, and the annexed rider, are conditional upon full and complete performance by Melanie of all her obligations, including delivery requirements, in the Songwriter's Agreement.

18. This is true even though paragraph 6 is a rider and contains a "time is of the essence" clause. Frequently in the music publishing industry we use riders to avoid retyping an entire agreement. We also cross out material and write changes in the margins. All these practices are used to save time and

bother. However, these changes do not make the contents independent of the rest of the agreement. Thus, the music publishing industry would not feel that the reversionary clause in the rider is independent of the delivery requirements set forth in paragraph 14 of the Songwriter's Agreement.

19. The time is of the essence clause in paragraph 6, a standard negotiated term conceded to major composers in the industry, does not mean that payments have to be made on a specific date. As the Court's opinion itself indicates, a person who does not receive royalties on a specific date, or even 60 or 90 days after payment may be due, does not by and large suffer any damage. All that the publisher is required to do is to pay money. A time of the essence clause indicates that the publisher is to prepare the accounting on a top priority basis. But no one in the music publishing business would ever consider that the failure to pay money on a specific date causes a reversion of copyrights. The penalty simply has no relationship to the injury.

Philip Kahl

PHILIP KAHL

Sworn to before me this
25th day of July, 1974.

Thomas D. Selz

Notary Public

THOMAS D. SELZ
Notary Public State of New York
No. 31-9320504
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

--and--

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

-against-

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

Exhibit G

AFFIDAVIT

73 Civ. 3789

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JEFFREY A FRANKLIN, being duly sworn, deposes and says:

1. I am President of American Talent International, Ltd., a New York corporation with offices at 888 Seventh Avenue, New York, New York, and submit this affidavit in support of the motion by Kama Rippa Music, Inc., Kama Sutra Music, Inc. and Buddah Records, Inc. (plaintiff-counterdefendants) for leave to reargue the decision of this Court, dated June 17, 1974.

2. Upon such reargument, it is submitted, this Court should reverse its decision granting summary judgment to Ms. Melanie Schekeryk, Mr. Peter Schekeryk, individually and d/b/a Amelanie Music and Two People Music (defendants-counterclaimants)

on the second and third counterclaims interposed in their Answer.

3. I have been in the field of booking concerts and arranging for record production and publishing agreements in the entertainment industry for approximately ten years. At this time, I am President of one of the biggest theatrical agencies specializing in music in the world. Accordingly, I believe my knowledge is extensive of the custom and trade of the entertainment ihdustry in general, and the musical recording field in particular.

4. I was not involved personally with the negotiation and execution of the several interrelated agreements among the parties which exist in this action but, based on my experience and knowledge of both the custom and trade of the business and the parties involved in this matter I believe I am able to render an opinion concerning the effect of those agreements and their compatibility with the normal business and trade of the music recording filed.

5. I have reviewed the Court's opinion, dated June 17, 1974, as well as the Songwriter's Agreement, the Co-Publishing Agreement and the Artist Recording Agreement, each dated May 31, 1968, the Recording Settlement Agreement of May 14, 1971 and the Amendatory Letter Agreement, dated August 24, 1971.

6. It is my opinion, based on the usual custom and trade of the music recording industry, that the agreements are to be read together creating a complex set of reciprocal obligations. For example, in the music industry it is well understood, although frequently not spelled out, that payments of royalties to an artist or composer are contingent upon full and complete performance by the artist or composer of his or her obligations under the respective agreements.

7. It is also my opinion that the Amendatory Letter Agreement clearly contemplates the intended release of the three recordings which are part of the subject matter of such Agreement. I have been advised and understand, however, that the Court has found ambiguity in the interpretation and meaning of the Amendatory Letter Agreement and, therefore, I will not discuss that Agreement at length except to make several pertinent comments.

8. It is clear, in my opinion, that the Amendatory Letter Agreement must contemplate the release of the recordings produced by defendant-counterclaimant Melanie Schekeryk ("Melanie"). In my opinion the agreement makes no sense if it is claimed to be merely an agreement whereby Melanie is obligated to record, and not to release, three written compositions.

9. In the popular music field, the publishing rights in compositions derive their value primarily from successful popular recordings. A hit record can sell an entire folio of the artist's compositions. In fact, popular music publishers frequently do not publish any sheet music by an artist-composer until that artist has had a hit record.

10. Thus, there is little value in having an artist-composer of Melanie's quality merely record three compositions. The release by Melanie of her recordings of her written compositions substantially increases the publishing value of all of the musical compositions written by Melanie pursuant to her agreements with plaintiff-counterdefendants. In fact, the release of the final three compositions helps to reimburse the recording and publishing companies for the advances that have been made to her by those companies in the early years of Melanie's career.

11. With a performer of Melanie's quality it is of the utmost importance to obtain her personal performance of the music compositions she creates. It is that performance which is ultimately of more value than the mere possession of written compositions to be performed by other unknown persons.

12. Timely delivery of the compositions and timely release of Melanie's recordings are clearly of the essence. The second paragraph of the Amendatory Letter Agreement states that delivery is to be made "under and pursuant to" the 1968 Songwriter's Agreement, thereby incorporating all of the terms and conditions of that Agreement by reference. Paragraph 14 of that 1968 Agreement makes timely delivery of the essence.

1968 SONGWRITER'S AGREEMENT AND RIDER

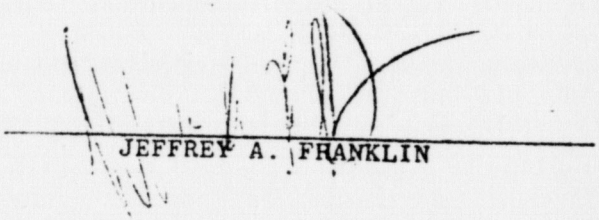
13. I have also reviewed the Songwriter's Agreement and the rider annexed to paragraph 6 thereof concerning the possible reversion of copyrights to Melanie's written compositions.

14. In my opinion, based on my experience in the music recording business, it is clear that the obligations of that paragraph, and the annexed rider, were understood to be interrelated to, and contingent upon full and complete performance by the artist of, all of the artist's obligations, including delivery requirements, in the Songwriter's Agreement.

15. This is true even though paragraph 6 is a rider and contains a "time is of the essence" clause. It is standard practice in the music industry to use riders to avoid retyping an entire agreement and thus to save time. However, merely because a reversionary clause such as this is in such a time-saving rider does not make it independent of the rest of the

Agreement. In particular, the clause is not independent of the delivery requirements set forth in paragraph 14 of the Songwriter's Agreement.

16. The time is of the essence clause in paragraph 6 a standard negotiated term conceded to major artists in the industry, does not mean that payments have to be made on a specific date. Putting together an accounting in the music industry is an incredibly complicated affair, and rarely are accountings available even sixty days, much less forty-five days, after the close of an accounting period. As the Court's opinion itself indicates, the person who does not receive royalties does not by and large suffer any damage. All that the payor is required to do is pay money. A time of the essence clause indicates that the payor is to prepare the accounting on a top priority basis. But no one would ever construe the failure to pay money on a specific date as precipitating a reversion of copyrights.



JEFFREY A. FRANKLIN

Sworn to before me this
25th day of July, 1974

Marlene H. Linder
Notary Public

MARLENE H. LINDER
Notary Public, State of New York
No. 31-7557600
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Exhibit H

---------- X

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

73 Civ. 3789

AFFIDAVIT

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

---------- X

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

IRWIN SCHUSTER, being duly sworn, deposes and says:

1. I am Vice President and Director of Professional Activities of Screen Gems-Columbia and Colgems Music. I have been with this company for six and one-half years. I have listened to the tape recordings of three compositions which Mr. Arthur Kass states were submitted to him as "recordings." It is my opinion that, as presented, they are to be considered "demos," not "recordings." They are not what industry standards would accept as "recordings" because they embody only the use of a piano and vocal and are not commensurate in the amount of musicians used and the arrangement with what are today's commercial recordings offered for sale to the public.

2. I have been in the music publishing business since 1955, nearly twenty years. I have heard hundreds and hundreds of "demos." There is no question but that what I have just heard is a demo and is not a "recording" as I understand it.

IRWIN SCHUSTER

Sworn to before me this
25th day of July, 1974.

MARTIN GARBUS
NOTARY PUBLIC, State of New York
No. 31-6457537
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Exhibit I

KAMA RIPPA MUSIC, INC.,

Plaintiff,

- against -

MS. MELANIE SCHEKERYK, et al.,

Defendants.

AFFIDAVIT

73 Civ. 3789

(Judge Knapp)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARTIN GARBUS, being duly sworn, says:

1. I am an attorney admitted to practice before this Court, and am a partner in the law firm of Emil, Kobrin, Klein and Garbus.

2. I have been special counsel to plaintiff, Kama Rippa Music, Inc. and Buddha Records, Inc. for approximately five years.

3. Based on information supplied to me from plaintiff's books and records, I can attest that from the inception of the relationship between Melanie and plaintiff, an unchallenged practice arose by which plaintiff made royalty payments to Melanie at varying times quite unrelated to strict contractual dates.

4. Although not contractually required, plaintiff paid Melanie advances against her writer's royalties on April 29, 1971. In addition, two advances (not contractually required) were paid to her against her co-publishing share of publishing royalties, one advance on January 18, 1971, and another advance

on September 17, 1971.

5. Of the 8 writer's royalties plaintiff paid to Melanie (due to the substantial advances paid to Melanie, she did not actually earn any writer's royalties until the beginning of 1970, nearly two years after entering into the Songwriter's Agreement), 2 royalty payments were made approximately 80 days after the close of the relevant accounting period, 3 payments were made approximately 100 days after the close of the relevant accounting period, 2 payments were made approximately 120 days after the close of the relevant accounting period, and 1 payment was made over 180 days after the close of the relevant accounting period.

6. It is in this context that the two 1973 demand letters threatening reversion of copyright must be viewed. Both demand letters were served in the midst of hostile, adversary negotiations following a breach by Melanie of her obligations to plaintiff. During these negotiations, plaintiff was trying to arrive at amicable settlements without the necessity of litigation. Based on the prior payment history described above, plaintiff and I then believed, and still do believe, that both demand letters were intended and understood as bargaining tools in connection with such negotiation. Had a demand for reversion really been intended, a fresh demand letter, disavowing bargaining intentions, would have been sent after negotiations were concluded or terminated.

7. Melanie virtually acknowledged as much, at least in connection with the first demand letter, by withdrawing the demand when a satisfactory agreement had been reached in the negotiations with Paramount Records, Inc.

8. In connection with plaintiff's motion for modification of this Court's Order pursuant to its June 17, 1973 Opinion, I

wish to point out to the Court the large number of musical compositions registered for copyright as compared to the very small number of songs which achieve popularity due to the efforts of recording and music publishing companies.

9. Based on the Report of the Register of Copyrights for fiscal year 1973, I note that 95,296 musical compositions were registered for copyright in fiscal year 1973. A copy of the Report setting forth this number is annexed hereto as Exhibit "1".

10. This large number of copyrights must be compared with the only 596 songs which reached the top 100 in popularity during 1973. (see July 25, 1974 affidavit by Arthur Kass, ¶ 15, submitted in connection herewith).

Wm. Garbus

MARTIN GARBUS

Sworn to before me this
26th day of July, 1974.

Gloria J. Holmes

Notary Public

GLORIA J. HOLMES
Notary Public, State of New York
No. 03-1843515
Qualified in Bronx County
Commission Expires March 30, 19 75

488A

Number of Registrations by Subject Matter Class, Fiscal Years 1969-73

Class	Subject matter of copyright	1969	1970	1971	1972	1973
A	Books, including pamphlets, leaflets, etc.	83,603	88,432	96,124	103,231	104,523
B	Periodicals (issues)	80,706	83,862	84,491	84,686	88,553
	(BB) Contributions to newspapers and periodicals	1,676	1,943	1,884	2,004	2,074
C	Lectures, sermons, addresses	1,155	1,669	1,855	1,940	1,714
D	Dramatic or dramatico-musical compositions	3,213	3,352	3,553	3,838	3,980
E	Musical compositions	83,608	88,949	95,202	97,482	95,296
F	Maps *	2,024	1,921	1,677	1,633	1,914
G	Works of art, models, or designs	5,630	6,807	7,916	7,901	8,621
H	Reproductions of works of art	2,489	3,036	3,047	3,434	3,190
I	Drawings or plastic works of a scientific or technical character	552	835	924	1,059	1,114
J	Photographs	936	1,171	1,160	1,140	1,354
K	Prints and pictorial illustrations	2,837	3,373	4,209	4,524	4,441
	(KK) Commercial prints and labels	4,798	5,255	4,424	4,118	4,216
L	Motion-picture photoplays	1,066	1,244	1,169	1,816	1,449
M	Motion pictures not photoplays	1,298	1,301	1,226	1,388	1,420
N	Sound recordings				1,141	6,718
R	Renewals of all classes	25,667	23,316	20,835	23,239	23,071
	Total	301,258	316,466	329,696	344,574	353,648

Number of Articles Deposited, Fiscal Years 1969-73

Class	Subject matter of copyright	1969	1970	1971	1972	1973
A	Books, including pamphlets, leaflets, etc.	164,958	174,519	189,887	203,875	206,671
B	Periodicals	160,707	166,976	168,114	168,463	176,142
	(BB) Contributions to newspapers and periodicals	1,676	1,943	1,884	2,004	2,074
C	Lectures, sermons, addresses	1,155	1,669	1,855	1,940	1,714
D	Dramatic or dramatico-musical compositions	3,563	3,751	3,993	4,216	4,538
E	Musical compositions	103,164	110,010	116,537	117,425	114,378
F	Maps	4,047	3,840	3,352	3,264	3,786
G	Works of art, models, or designs	9,688	11,736	13,894	13,590	14,843
H	Reproductions of works of art	4,811	6,046	6,056	6,821	6,313
I	Drawings or plastic works of a scientific or technical character	839	1,267	1,419	1,614	1,873
J	Photographs	1,565	2,080	2,056	2,053	2,471
K	Prints and pictorial illustrations	5,671	6,740	8,417	9,036	8,873
	(KK) Commercial prints and labels	9,595	10,510	8,846	8,235	8,308
L	Motion-picture photoplays	2,100	2,448	2,305	3,593	2,855
M	Motion pictures not photoplays	2,471	2,460	2,318	2,648	2,654
N	Sound recordings				2,282	13,388
	Total	476,010	505,995	530,933	551,069	570,981

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Exhibit J

KAMA RIPPA MUSIC, INC., Plaintiff	:	JUDGE WHITMAN KNAPP
-against-	:	
MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a MELANIE MUSIC, INC., Defendants.	:	73 Civ. 3789
-and-	:	
MELANIE and PETER SCHEKERYK, individually and d/b/a MELANIE MUSIC and TWO PEOPLE MUSIC, INC., Counterclaimants,	:	
-against-	:	
KAMA RIPPA MUSIC. INC., KAMA SUTRA MUSIC, INC. and BUDDAH RECORDS, INC., Counterdefendants.	:	

NOTICE OF APPEAL

S I R S :

Notice is hereby given that plaintiff-counterdefendant, Kama Rippa Music, Inc., hereby appeals to the United States Court of Appeals for the Second Circuit from that portion of the Order and Judgment entered in the above action by the Honorable Whitman Knapp, United States District Judge, on July 22, 1974, which grants defendant-counterclaimant Melanie Schekeryk's cross-motion for summary judgment on the second and third counterclaims against

plaintiff-counterdefendant Kama Rippa Music, Inc.

Dated: New York, New York
July 26, 1974

Yours, etc.,

EMIL, KOBRIN, KLEIN & GARBUS
Attorneys for Plaintiff-
Counterdefendant

By_____
A Member of the Firm

Office and Post Office Address
540 Madison Avenue
New York, New York 10022
Tel. No.: (212) 688-6040

TO:

CLERK, UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
United States Court House
Foley Square
New York, New York 10007

SANDOR FRANKEL, ESQ.
Attorney for Defendants-Counterclaimants
225 Broadway
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

-against-

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

Exhibit K

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AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HARLEY I. LEWIN, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of New York and am presently employed by American Talent International, Ltd., as General Counsel. American Talent International, Ltd., is a New York corporation with offices at 888 Seventh Avenue, New York, New York.

2. Prior to my employment as described above, I was associated with the law firm of Emil, Kobrin, Klein & Garbus. In such capacity I was responsible for the drafting of the great bulk of the documents involved in the instant case and, more particularly, secured the initial Order of Attachment in the Supreme Court of the State of New York.

3. With respect to said Order of Attachment, the assets of the defendants were attached by service upon the plaintiff itself who at that time held certain of the defendant's monies and by service upon defendant's attorney.

4. While it may be that objection could be raised to the matter of service of an Order of Attachment upon oneself, I specifically made request of the appropriate personnel in Special Term, Part II of the Supreme Court of the State of New York who are charged with reviewing all submitted documents for attachment prior to their going to the Justice then sitting.

5. I call specific attention to the fact that we were attaching in effect ourselves and asked whether this procedure had been previously followed and found acceptable by the State authorities. The answer given was in the affirmative and as a result I proceeded to submit the papers for review of the Justice then sitting. The Justice ultimately executed them and the judgment was levied.

6. To my knowledge, in addition to the above described factual pattern, the service of an Order of Attachment upon oneself is not uncommon. Prior to the instant case I, as attorney for several clients, secured similar orders based on the factual pattern that revealed no assets but those temporarily located within the control of the complainant/plaintiff itself.

7. An Order of Attachment makes no distinction as to who holds the assets sought to be secured. Provided one falls within the provisions of the statute delineating attachment requirements (CPLR § 6201) it does not seem illogical to attach oneself. To the contrary, it would seem that by submitting to Court procedure and revealing to the Court from the outset that the plaintiff itself holds the assets to be attached (as opposed to simply non-payment, using the money held as a "club"),

one is in fact operating in a highly ethical manner.

I would respectfully submit that the above facts be taken into account and that a re-hearing be granted in this matter.

HARLEY L. LEWIN

Sworn to before me this
18th day of July, 1974

Notary Public, State of New York
No. 31-7557620
Qualified in New York County
Commission Expires March 30, 1976

2525-4
legal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAMA RIPPA MUSIC, INC.,

Plaintiff,

- against -

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants.

- and -

MELANIE and PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC and TWO PEOPLE MUSIC,

Counterclaimants,

- against -

KAMA RIPPA MUSIC, INC., KAMA SUTRA MUSIC, INC., and BUDDAH RECORDS, INC.,

Counterdefendants.

ORDER

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This motion by plaintiff seeks three forms of relief: (1) setting aside the order granting summary judgment; (2) modifying the order, or (3) staying its execution. All such relief is denied.

The part of the motion seeking to set aside the order is based upon assertions that the contract does not mean what it says. Such assertions are barred by the parol evidence rule. The critical clause of the contract is as follows:

> "The payment of royalties when due are of the essence. Accordingly, if Publisher fails to account and pay royalties in accordance with this Paragraph and such failure and default continues following thirty (30) days written notice of such failure and default, this

agreement shall terminate and all rights in and to the compositions theretofore covered shall revert to the Writer. This provision may be specifically enforced."

Several affidavits are submitted to the general effect that the foregoing language does not at all mean what it says but is simply an indication that the payment of royalties would be given "first priority". I find the language quoted to be unambiguous and not susceptible to variation by parole evidence.

With respect to the motion to modify, I find the "restitution" law cited to be inapplicable. The order as originally entered does not direct restitution. It merely grants specific performance of a contract.

With respect to the application for a stay pending appeal, it is my belief that stays pending appeal are more appropriately the province of the Court of Appeals. That application is accordingly denied.

In conclusion I would note that Mr. Lewin's affidavit (Exhibit K to the motion papers) misses the point. The denial of the defense of impossibility did not rest upon a finding that the attachment was improper but upon the obvious fact that plaintiff at all times had it in its uncontrolled power to direct the Sheriff to release the attachment to the extent necessary to allow plaintiff to comply with its contractual obligations.

The motion is in all respects denied.

SO ORDERED.

Dated: New York, New York
July 30, 1974.

WHITMAN KNAPP, U.S.D.J.

Service of 1 copies of this within
Joint Appendix is admitted this
13 day of November 1974

Sanders Fleming

ATTORNEY FOR

Defendants-Counterclaimants-Appellees